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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 991

MARY HARE STANLEY,

Petitioner

vs.

THEODORE HAWKINS STANLEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AMARILLO, TEXAS

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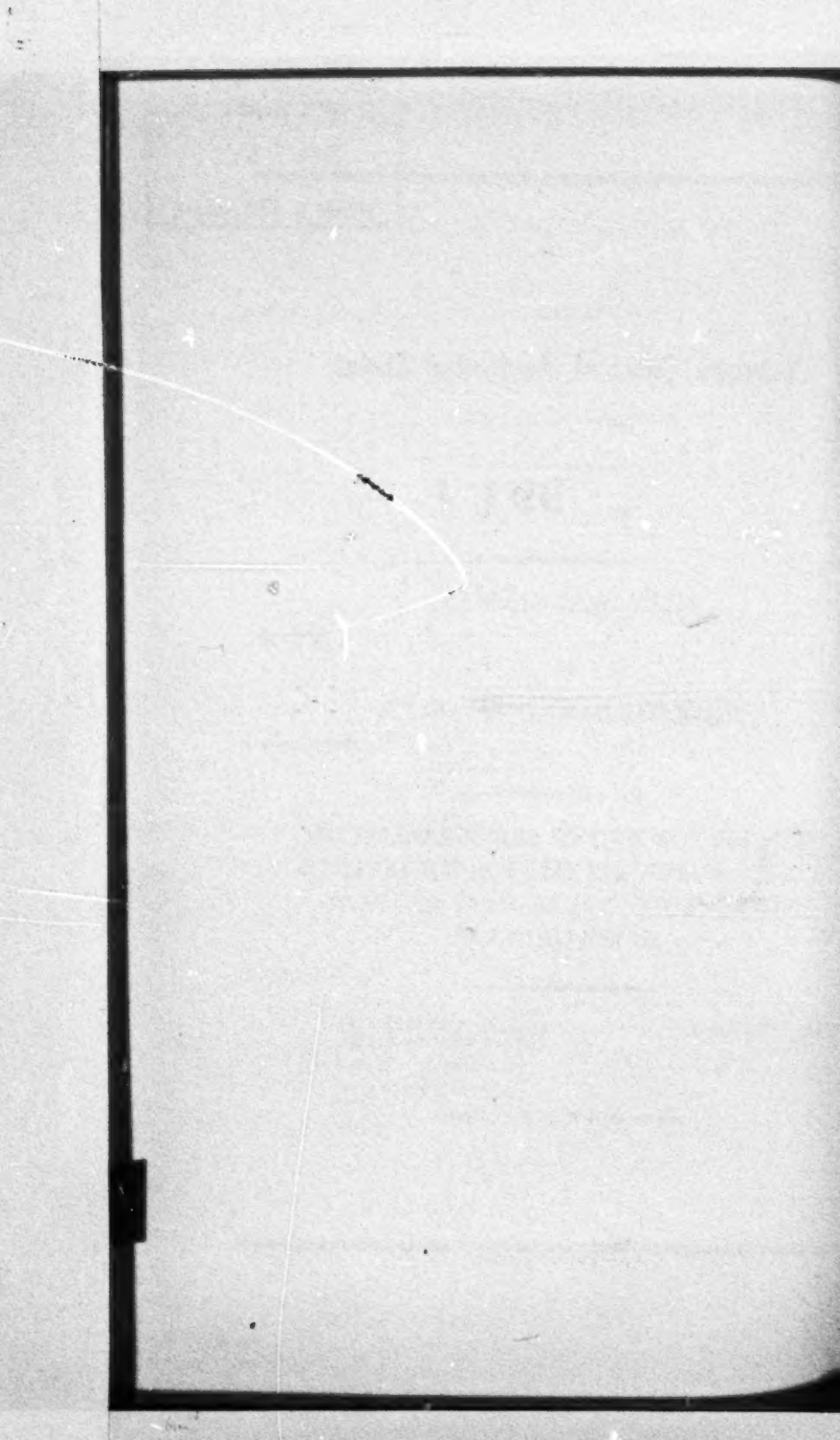

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas which became final on February 27, 1957.

OPINIONS BELOW

The opinion of the trial court is not reported but is printed in Appendix C, infra, p. 45. The majority opinion of the Court of Civil Appeals for the Seventh Judicial District of Texas is reported in Vol. 294 SW 2d, p. 132 and is printed in Appendix A hereof, infra, p. 22. The dissenting opinion of Herbert C. Martin, Associate Justice of the Court of Civil Appeals, is reported in Vol. 294 SW 2d, p. 138 and is printed in Appendix B hereof, infra, p. 32. The action of the Supreme Court of Texas in refusing the application for writ of error to that court,

"Writ Refused, No Reversible Error", was without written opinion and the certificate of the clerk of that court of such action is printed in Appendix D hereto, infra, p. 52. The action of the Supreme Court of Texas in overruling the motion for rehearing was without written opinion and the certificate of the action of such court is printed in Appendix D hereof, infra, p. 52.

JURISDICTION

The judgment of the Court of Civil Appeals of the Seventh Supreme Judicial District, entered September 24, 1956, (printed in Appendix A, p. 22 hereof), became final on February 27, 1957, the date the Supreme Court of Texas overruled the Petitioner's motion for rehearing to that court. (Appendix D, p. 52 hereof).

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3), since the validity and application of a statute of the State of Texas (Article 4619, Vernon's Annotated Texas Civil Statutes, V. 13, p. 775) is drawn in question as a result of the construction and effect given the statute by the Court of Civil Appeals and, also, Petitioner sets up a claim as to her title, right, privilege or immunity to own, enjoy and dispose of her property under the Constitution of the United States.

QUESTIONS PRESENTED

1. Is the decision of a state court which establishes a rule the Legislature of the state could not have enacted without conflicting with the due process clause of the Fourteenth Amendment to the Constitution of the United States, as invalid as such a statute would be?

2. Does sole fact of marriage and existence of property at dissolution of marriage furnish substantial basis for a *conclusive* presumption that all property is of community status?

3. The Court of Civil Appeals has said, in effect, "One-half of the property owned by Petitioner at marriage shall, upon dissolution of the marriage, be divested from her and vested in Respondent under a statutory presumption *regardless of evidence*

which refutes the presumption." Is such a deprivation of property so unjust and ill-founded as to be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States and, therefore, should be vitiated?

4. Is a decision of a state court which places such a construction upon a statutory presumption as to give it the *conclusive* effect that, upon dissolution of marriage, all property is community, *without fair opportunity to repel it or without rational connection between proof that property is separate and the inference that it is community*, arbitrary and repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States?

5. Is a decision of a state court which, by construction, establishes such a statutory presumption as to make it arbitrary or operate to deny full opportunity to repel it, repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States?

6. Is due process of law denied by a decision of a state court which construes a statutory presumption in such a manner as to make the facts presumed *conclusive* without a rational connection between what is proved and what is inferred?

7. Should a decision of a state court which denies Federal rights upon a basis of fact which has no support in the record be permitted to stand?

8. Is the action of a state court in requiring a burden of proof which, according to common knowledge and experience of man, is impossible to meet oppressive and repugnant to the due process clause of the Fourteenth Amendment?

STATUTE INVOLVED

The statutory provision involved is Section 1 of Article 4619 of Vernon's Texas Civil Statutes, Vol 13, Vernon's Annotated Texas Civil Statutes, p. 775, which is printed in Appendix G, p. 74 hereof.

STATEMENT OF CASE

This is an action for divorce with resulting adjudication of the property rights of Petitioner. The state courts granted Petitioner divorce.

Action of the trial court was affirmed by a majority opinion (printed in Appendix A, p. 22 hereof) of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas. Herbert C. Martin, Associate Justice, strongly dissented from the majority opinion (printed in Appendix B, p. 32 hereof.)

Petitioner does not seek Petition for Certiorari on the sole grounds that the final judgment of the state court is an erroneous decision on a question of state law or overruled principles established by previous decisions upon which Petitioner relied. Petitioner is concerned with meritorious claims arising under the Federal Constitution. Claiming the state courts, in dealing with her separate property upon dissolution of marriage, divested her of her separate property without the due process of law guaranteed her by Section 1 of the Fourteenth Amendment to the Constitution of the United States. The means by which the property rights of Petitioner were determined are presented for review.

The majority decision of the Court of Civil Appeals was the first state decision which, by construction, made the statutory presumption created by Article 4619 of Vernon's Texas Civil Statutes, Vol. 13, Vernon's Annotated Texas Civil Statutes, p. 775, *conclusive* in face of refuting evidence. The first indication that Petitioner had that the Supreme Court of Texas would permit the Court of Civil Appeals *to digress from established rules of property* and apply a new construction to the statutory presumption created by Article 4619, supra, in variance with previous holdings of the State Supreme Court and other Courts of Civil Appeals of the state, was when the State Supreme Court ruled, "Writ Refused. No Reversible Error". The Supreme

Court thereby saying, "The Court of Civil Appeals *incorrectly* declared the law, but the errors do not *require* reversal." (See Vernon's Annotated Texas Rules of Civil Procedure No. 483, Vol. 3, p. 440 which is printed in Appendix E hereto, p. 53.) This action of the State Supreme Court was the first time Petitioner had cause to believe or anticipate that the State Supreme Court would permit the Court of Civil Appeals to deprive her of her rights to "due process of law" and "equal protection of law". The motion for rehearing in the State Supreme Court was the first opportunity Petitioner possessed to claim the violation of her Federal rights. This she did, in timely raising her Federal rights, in addition to her claims on the merits, in her motion for rehearing which was overruled. (Pages 60, 63, 64, 66 and 68 of Petitioner's motion for rehearing which is printed in Appendix F hereto, infra, p. 54.) *Great Northern Railway Company vs. Sunburst Oil And Refining Company*, 287 U. S. 358, 367; *Brinkerhoff-Faris Trust And Savings Company vs. Hill*, 281 U.S. 673, 678; *Missouri ex rel Missouri Insurance Company vs. Gehner*, 281 U. S. 313, 320; *Saunders vs. Shaw*, 244 U. S. 317, 320.

The undisputed evidence established the following (1) Petitioner and Respondent were married August 17, 1949; (2) no childen were born or adopted (S.F., p. 82, Lines 17 through 24); (3) Petitioner owned as her separate property at time of marriage three-fourths interest in the Southern Brokerage Company of the value of $85.53, one-half interest in the Local Finance Company of the value of $1,158.61, all of the Plains Finance Company of the value of $3,102.72, all of the Texas Management Company of the value of $47,763.27 (her capital assets in these businesses had an aggregate value of $52,110.13), $26,600.00 cash in a safety deposit box, $6,244.72 cash in a checking account, and $1,000.00 cash on her person. Cash and capital assets owned by her totaled $85,954.29 (S.F., p.

110, Line 22 through Line 17, p. 113; S.F. p. 146, Line 7 through Line 8, p. 150). In addition, Petitioner owned $850.00 in United States Savings Bonds and one 1947 Cadillac (S.F., p. 599, Line 11).

Earnings from the finance companies were Petitioner's sole sources of income (S.F., p. 520, Lines 11 through 16). These businesses made profits during each year of marriage (S.F., p. 502, Lines 17 through 24), which totaled $84,044.63 (S.F., p. 165, Line 5). All earnings from her property were withdrawn and *lawfully* expended. In addition to the earnings, $41,911.93 was withdrawn from the original capital of her businesses (S.F., p. 466, Lines 8 through 25; Petitioner's Exhibits 4, 12, 13, 28 and 29, which accompany the record in original text).

Respondent owned no property at marriage (S.F. p. 6, Lines 4 though 9). He contributed nothing to the benefit of the family (S.F., p. 107, Lines 2 through Line 4, p. 110).

The Texas Management Company, which possessed an admitted value of $47,763.27 on date of marriage, had been reduced in value to $26,713.24 (S.F., p. 270, Line 20 through Line 7, p. 271), for which it was sold and the cash realized from the sale of these assets, owned by Petitioner at marriage, was represented in the cash on hand at dissolution of marriage.

The Certified Public Accountant testified for Petitioner. He currently handled all Petitioner's accounts, books and records previous to and throughout the marriage. He presented a comprehensive accounting concerning the minute details of all the business and personal affairs of Petitioner from date of marriage to its dissolution (S.F., p. 140, Line 6 through Line 5, p. 142; S.F., p. 144, Line 5 through Line 1, p. 145; S.F., p. 263, Line 13; S.F., p. 158, Line 25 through Line 3, p. 159; S.F., p. 290, Line 2 through Line 8, p. 298; S.F., p. 242, Line 10 through Line 18, p. 243). The testimony of the accountant clearly detailed and explained Petitioner's accounts, personal acquisitions and disbursements, business affairs and conduct

again and again. His testimony exhausted three hundred fifty-five pages of the six hundred eighty-three pages of testimony, existing in the Statement of Facts accompanying this record, and fully detailed and substantiated the following exhibits of Petitioner which accompany the record in original text, viz: No. 4 (Summary of Capital Account), Nos. 5 through 11 (Check Spreads), No. 12 (Depreciation Summary), No. 13 (Summary of Worth of Loan Companies), No. 28 (Summary of Accounts Stated in Exhibit 4), and No. 21 (Summary of Monthly Check Spreads).

Resort to innuendo failed to destroy the propriety with which Petitioner used her safety deposit box as a cash depository. She maintained the use of the box in the same manner during marriage as before marriage (S.F., p. 552, Line 22 through Line 16, p. 553). The accountant relied upon her statements as to amounts and dates of withdrawals and additions to the box, which are fully corroborated by the exactness and balance of the accounts and accounting presented (S.F., p. 556, Line 17 through Line 11, p. 557).

The seventy-two exhibits offered by Petitioner, which accompany the record in original text, and the 355 pages of the accountant's testimony completely reveal, in detail, all of Petitioner's transactions and conduct, both personal and business-wise, to the end result that all monies earned during marriage which came into her possession were *lawfully* expended and *her original capital assets had been reduced in value.* The factual result being that all property on hand at dissolution of marriage *belonged to the separate estate of Petitioner.*

The state court refused or failed to give to the evidence of the accountant and Petitioner's exhibits the import to which they are entitled under "due process of law". To the contrary, the state court determined that the statutory presumption created by Article 4619 (printed in Appendix G, p. 74 hereof) was *conclusive* and that all property on hand at dissolution of marriage

belonged to Petitioner and Respondent equally. Petitioner claims such action of the state court has not only deprived her of her separate property without due process of law, but that the State of Texas, *acting through its judiciary, has made the guarantees of Section 1 of the Fourteenth Amendment but vain and meaningless grants. The dissenting opinion (printed in Appendix B, p. 32 hereof) of Justice Martin concedes such result.*

REASONS FOR GRANTING THE WRIT

The constitutional questions raised in this case strike at the very heart of our constitutional concepts of justice and the individual right to own, use and dispose of property.

The decision of the state court has destroyed the constitutional right of married persons in Texas to individually own and enjoy property. The general rights of the public who deal with married persons in Texas on the basis of individual ownership and use of property are seriously jeopardized.

A state court decision which evades the potentialities of the Bill of Rights destroys the constitutional guarantees.

Fiction cannot oppose truth. Mere judicial fiat should not take the place of fact in determining issues involving property.

The mere right to be heard does not satisfy "due process". *A fair evaluation of the evidence adduced is an elementary requisite.* Due process of law requires essential fairness and justice in judicial proceedings, and in determining whether such fairness and justice are present, the entire judicial process, including review on appeal, should be considered.

A state court decision is but form. In a fair judicial proceeding, the facts are the substance upon which the form must stand or fall.

The action of a state court in requiring a burden of proof which, according to common knowledge and experience of man, is impossible to meet is oppressive and repugnant to the due process clause of the Fourteenth Amendment.

No state court should be permitted to deal lightly with a lifetime's savings of a sixty-five year old woman. The security in property as contemplated by Section 1 of the Fourteenth Amendment is a mandate to further the assurance of security of the person in the declining years of life. In truth, the deprivation of subsistence in the late years of life might well be the deprivation of life itself.

The foregoing fundamental must be jealously protected in order to assure the citizens of the United States the benefits of the safeguards established by the Fourteenth Amendment to the Constitution of the United States. Any permitted evasion, directly or indirectly, of these fundamentals render the safeguards idle.

The foregoing fundamentals and privileges accorded the citizens of the United States by Section 1 of the Fourteenth Amendment to the Constitution have been denied Petitioner and all persons in Texas who are married or may marry, and this Honorable Court should, in exercising its discretionary powers, grant the Petition for Certiorari for the following reasons:

I.

A DECISION OF A STATE COURT WHICH ESTABLISHES A RULE THE LEGISLATURE OF THE STATE COULD NOT HAVE ENACTED WITHOUT CONFLICTING WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, IS AS INVALID AS SUCH A STATUTE WOULD BE.

II.

SOLE FACT OF MARRIAGE AND EXISTENCE OF PROPERTY AT DISSOLUTION OF MARRIAGE FURNISHES NO SUBSTANTIAL BASIS FOR A *conclusive* PRESUMPTION THAT ALL PROPERTY IS OF COMMUNITY STATUS.

belonged to Petitioner and Respondent equally. Petitioner claims such action of the state court has not only deprived her of her separate property without due process of law, but that the State of Texas, *acting through its judiciary, has made the guarantees of Section 1 of the Fourteenth Amendment but vain and meaningless grants. The dissenting opinion (printed in Appendix B, p. 32 hereof) of Justice Martin concedes such result.*

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SOLE FACT OF MARRIAGE AND EXISTENCE OF PROPERTY AT DISSOLUTION OF MARRIAGE FURNISHES NO SUBSTANTIAL BASIS FOR A *conclusive* PRESUMPTION THAT ALL PROPERTY IS OF COMMUNITY STATUS.

III.

THE COURT OF CIVIL APPEALS HAS SAID, IN EFFECT, "ONE-HALF OF THE PROPERTY OWNED BY PETITIONER AT MARRIAGE SHALL, UPON DISSOLUTION OF THE MARRIAGE, BE DIVESTED FROM HER AND VESTED IN RESPONDENT UNDER A STATUTORY PRESUMPTION *regardless of evidence which refutes the presumption.*" SUCH A DEPRIVATION OF PROPERTY IS SO UNJUST AND ILL-FOUNDED AS TO BE REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND, THEREFORE, SHOULD BE VITIATED.

For the purposes of brevity and convenience to the court, questions Nos. I through III are grouped for argument and presentation.

Previous to the decision of the state court in this case, the State Supreme Court and other State Courts of Civil Appeals had construed the statutory presumption created by Article 4619, supra, as *controlling only in the absence of proof*. Upon the coming of "*any*" evidence the presumption disappeared. The construction of this presumption was discussed in length in *Janes et al vs. Gulf Production Company* (on rehearing) 15 SW (2) 1107, which was fully adopted by the State Supreme Court (Writ Refused). This construction of the statutory presumption had been consistently and uniformly followed by the state courts until the decision of the state court was rendered in this case. *Barrington vs. Barrington*, 290 SW (2) 297; *Coggin vs. Coggin*, 204 SW (2) 47 — *(This opinion is by the very court to which Petitioner seeks certiorari).*

The decision of the state court in this case has, in effect, construed Article 4619, supra, to be and mean, "Upon the dissolution of marriage, one-half of the property owned or claimed by a married person at the time of or previous to such marriage shall vest in the other spouse." Had the Legislature so spoken, the statute would have been oppressive, arbitrary and capricious and would deprive this Petitioner of her rights in and to her

property without "due process of law". In creating such a repugnancy to the due process clause of the Fourteenth Amendment to the Federal Constitution, the state court likewise completely ignored the provisions of Section 15 of Article 16 of the Texas Constitution (printed in Appendix H, p. 75 hereof) which says that the property owned or acquired by a person previous to marriage *shall be the separate property of such person, even after marriage.* Therefore, the state court, by the construction, enforcement and effect given this Article 4619, rendered the article arbitrary, oppressive and unjust by judicial decision and made the same repugnant to the due process clause of the Fourteenth Amendment. Such decision likewise *makes a substantial and important departure from the accepted and usual course of the judicial construction of the statutory presumption created by Article 4619 and the Texas Constitutional declaration as to what shall be and constitute the separate property of a married person, and the State Supreme Court has sanctioned such a departure by the lower court of such a grave and serious effect upon the constitutional right of married persons in Texas to individually own property, as to call for an exercise of this Honorable Court's supervision.* Further, the Commission of Appeals (adopted by the State Supreme Court) in *Hawkins vs. Britton State Bank*, 52 SW (2) 243, announced the recognized principle that the provisions of Section 15 of Article 16 of the Texas Constitution, which establishes what shall be and constitute the separate property of a married person, cannot be enlarged or diminshed by the Legislature or the judiciary. The Commission further stated that the action of the Legislature or judiciary in *diminishing* the separate property, as declared by the Texas Constitution, would "rob" the spouse owning such property of the rights in and to the same. The State Supreme Court has heretofore gone much further and said that a *statutory enactment* which increases or diminishes the separate property *as established by the Texas Constitution is invalid. Arnold vs. Leonard*, 273 SW 799. *Surely, if the Legislature of*

Texas could not vary from the constitution and diminish the separate estate created by the State Constitution, then certainly the state court in this case could not do so without creating the same evil.

The state court, in digressing from established rules of law by construing the statutory presumption created by Article 4619, supra, to be *conclusive*, deprived Petitioner and all other persons married or who may marry in Texas of individual property rights without due process of law as guaranteed by the Fourteenth Amendment. The evil rests with the *method* of departure from established rules of law — rather than the *bare* departure. The method by which the state court digressed from established rules of construing the statutory presumption transgressed upon Petitioner's Federal rights.

The only evidence in this record available to the state court upon which to establish the property on hand at dissolution of the marriage to be community is: (1) The parties were married, (2) property owned by Petitioner when married earned $84,044.63 during marriage, and (3) there was property on hand when the marriage was dissolved. The state court held these facts justified making the statutory presumption conclusive that all property on hand belonged to the community and was owned by both Petitioner and Respondent. This, in spite of comprehensive accounting established by Petitioner which proved: (1) The amount of property she owned at marriage, (2) her property earned $84,044.63 during marriage, (3) all of her earnings during marriage were expended for the benefit of the community (both Petitioner and Respondent), (4) Respondent contributed nothing, (5) property owned by Petitioner before marriage had been reduced in value, (6) all of Petitioner's businesses but one were sold during marriage, and, as a result (7) all property on hand actually consisted of property owned by Petitioner before marriage. *Remove the conclusive presumption that all property on hand when the marriage was dissolved is community, and there is no evidence or other substantial basis*

upon which to find the property was community. All evidence adduced at the trial established, without contradiction, that the property on hand belonged to the separate estate of Petitioner.

The state court's judgment holding the statutory presumption *conclusive* under these circumstances is unjust and ill-founded. To say, as the state court did, "One-half of the property owned by Petitioner at marriage shall, upon dissolution of the marriage divest from her and vest in her husband *regardless of undenied evidence which established the property to belong to her,*" constitutes an arbitrary divestiture of Petitioner's property which is repugnant to the due process clause of the Fourteenth Amendment. The courts, in construing this statutory presumption to be *conclusive,* made the presumption more than a "rule of evidence" and made the same an arbitrary and oppressive "divestiture of property" by construing an otherwise valid statute in such a manner as to make it repugnant to the due process clause of the Fourteenth Amendment. *Brinkerhoff-Faris Trust And Savings vs. Hill,* 281 U.S. 672, 680, 682; *Western And Atlantic Railroad vs. Mary E. Henderson,* 279, U.S. 639; *Armin A. Schlesinger vs. State of Wisconsin,* 270 U.S. 230.

Sole fact of marriage and existence of property at dissolution of marriage bears no rational connection between the facts presumed and the proof in this record; the construction given the presumption is unreasonable and made *conclusive* the rights of Petitioner in and to her property regardless of true facts. *W. D. Manley vs. State of Georgia,* 279, U.S. 1, 6.

IV.

A DECISION OF A STATE COURT WHICH PLACES SUCH A CONSTRUCTION UPON A STATUTORY PRESUMPTION AS TO GIVE IT THE *conclusive* EFFECT THAT, UPON DISSOLUTION OF MARRIAGE, ALL PROPERTY IS COMMUNITY, *without fair opportunity to repel it or without rational connection between proof that property is separate and the inference that it is community* IS

ARBITRARY AND REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

V.

A DECISION OF A STATE COURT WHICH, BY CONSTRUCTION, ESTABLISHES SUCH A STATUTORY PRESUMPTION AS TO MAKE IT ARBITRARY OR OPERATE TO DENY A FULL OPPORTUNITY TO REPEL IT, IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

VI.

DUE PROCESS OF LAW IS DENIED BY A DECISION OF A STATE COURT WHICH CONSTRUES A STATUTORY PRESUMPTION IN SUCH A MANNER AS TO MAKE THE FACTS PRESUMED *conclusive* WITHOUT RATIONAL CONNECTION BETWEEN WHAT IS PROVED AND WHAT IS INFERRED.

For the purposes of brevity and convenience to the court, questions Nos. IV through VI are grouped for argument and presentation.

As heretofore stated, the decision of the state court made the statutory presumption created by Article 4619, supra, *conclusive* that all property in possession of Petitioner at the time the marriage was dissolved belonged to her and Respondent equally *without regard to the true facts revealing the actual ownership of such property to be in Petitioner.*

There is no rational connection between the three hundred fifty-five pages of the accountant's testimony and Petitioner's exhibits establishing the property on hand to belong to her and the inference (made conclusive) that the property did not belong to her but to both Petitioner and Respondent equally.

Due process of law is not satisfied when a state court says, "We will open open the courthouse doors, *but will pay no attention to the evidence you present for we will find that, regard-*

less of the evidence presented in the hearing, your rights in and to the property are conclusively destroyed by the statutory presumption." The mere opportunity to be heard mocks the due process clause of the Fourteenth Amendment *if there is not a fair evaluation made of the evidence adduced at the hearing and rights determined from such evaluation.* A fair opportunity to repel the presumption was not afforded Petitioner in this case. Even though she presented a comprehensive accounting, as any prudent businessman or businesswoman would maintain in commercial enterprises, which undeniedly refuted the statutory presumption that the property belonged to the community, the courts did not give her a fair opportunity to repel the presumption. The state court still insisted that the presumption was *conclusive* regardless of fact to the contrary. This is a flagrant denial of due process of law. A deprivation of property rights in such a manner is oppressive and repugnant to the due process clause and the privileges and immunities accorded Petitioner in the Fourteenth Amendment.

With all due respect to the state courts, it is respectfully urged that there is not only a wholly lacking of a rational connection between the proof that the property belonged to Petitioner and the presumption that one-half of it did not, there is also *no rational connection between the facts stated in the state court decision and the facts established in the record of this case. Reading the decision alone, it appears sound; however, when comparing the findings reflected in the decision with the facts in the record, one is at quandary as to the association between the two. It is of prime importance that no constitutional guarantee, least of all the right to own property, be divested by unsubstantial findings of fact, screening reality. This is the very reason why this Honorable Court has the power to search the records in the state courts where a claim of constitutionality has been made.*

Under all standards previously recognized by this Honorable Court, the judicial construction given the statutory presumption created by Article 4619 by the state courts is unconstitutional.

Brinkerhoff-Faris Trust And Savings vs. Hill, 281 U.S. 672, 680, 682; *Western And Atlantic Railroad vs. Mary E. Henderson*, 279 U.S. 639; *Armin A. Schlesinger vs. State of Wisconsin*, 270 U.S. 230.

VII.

A DECISION OF A STATE COURT WHICH DENIES FEDERAL RIGHTS UPON A BASIS WHICH HAS NO SUPPORT IN THE RECORD SHOULD NOT BE PERMITTED TO STAND.

VIII.

THE ACTION OF A STATE COURT IN REQUIRING A BURDEN OF PROOF WHICH, ACCORDING TO COMMON KNOWLEDGE AND EXPERIENCE OF MAN, IS IMPOSSIBLE TO MEET IS OPPRESSIVE AND REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

For the purposes of brevity and convenience to the court, questions Nos. VII and VIII are grouped for argument and presentation.

Respondent and the state court relied heavily on an *inapt* version of the theory of commingling. The *uncontroverted* evidence shows that Petitioner owned cash capital in finance companies at the time of mariage. These companies earned profits during the marriage. With the exception of the first year of marriage, annual withdrawals from her businesses exceeded the annual earnings.

The only community property mixed with her separate property was the mixture of *cash profits* with her *cash capital* during the operation of the finance companies while earning profits. *At the time of divorce, all earnings had been dissipated and a portion of Petitioner's original capital investments had been withdrawn.*

The only mixture of properties consisted of *cash with cash.* At all times, Petitioner maintained a complete accounting re-

vealing the amount of cash on hand which was capital and the amount of cash on hand which was earnings. The accounting revealed that, with the exeption of the first year of marriage, these withdrawals consistently exceeded cash earnings. The only means by which Respondent attacked the accuracy of such accounting was by contending that the separate interest of Petitioner could not be traced as compared to the community interest *because the accountant could not identify the exact dollars on hand at dissolution of marriage as being the identical dollars she owned at marriage. This absurdity was adopted by the state court in disregarding the substantial facts of the accounting and the import that should have been given it under due process of law.*

This conclusion as to *tracing* is more than a finding of fact — *it is a legal conclusion* which, it is respectfully urged, this Honorable Court should review. *No court should be permitted to distort, even if unintentionally, the evidence in a record of litigation and, therefrom, mold a conclusion of law which deprives a litigant of valid property rights.* It is respectfully urged that this court is justified in searching this record to determine whether the crucial findings of the state court had a reasonable basis on the evidence. It is of prime importance that the constitutional guarantee that a person shall not be deprived of property without due process of law should not be divested by unsubstantial findings of fact, *screening realities,* and that is why this court possesses the ultimate power to search the records of the state court on Petitioner's claim that she has been deprived of her property without due process of law. It is admitted that the majority opinion of the Court of Civil Appeals *appears* sound. No constitutional right should be denied a citizen of the United States by judicial *evasion* because the decision *appears* sound *if, when compared with the record, the decision bears no natural relationship or rationale to the facts. It is respectfully urged that the dissenting opinion of Associate Justice Martin clearly reveals the inequities concealed and made latent by the majority*

opinion. Such a flagrant evasion of the property rights of Petitioner by the state court strikes at the very fundamentals of the "due process" concept.

Considering further the onerous burden which the state courts demanded of Petitioner, the state courts concluded that because Petitioner was operating business enterprizes and mixing dollars of separate property with dollars of community property she failed to meet the burden placed upon her *because she could not identify the dollars on hand at dissolution of marriage as being the same or exact dollars owned by her at marriage.* It is the common knowledge and experience of man, particularly persons of the business and commercial world, that accounting principles have been universally adopted to establish various monetary interests of individuals dealing in business and commercial affairs, *and that such accounting reveals the interests of individuals irrespective of the fact that dollars on hand at any given time cannot be identified as being the same dollars which were on hand at the beginning of the business or commercial operation.* The state courts, in saying that the burden of proof required that she prove that the same bill of five dollar denomination she possessed at time of dissolution of marriage must be established as the same bill of five dollar denomination she had at time of marriage, and if this burden is not met, she has failed to trace her funds and must, accordingly, lose her entire original capital investment, is an oppressive requirement of proof and repugnant to the due process clause of the Fourteenth Amendment. Petitioner should not be burdened with such an onerous requirement of proof in order to preserve her property rights. *Can it honestly be said that if a depositor places a twenty dollar bill in a checking account with a bank and when the bank refunds him his twenty dollars by honoring a check, the bank will be required to establish that the very twenty dollar bill returned to the depositor is the same twenty dollar bill deposited or the bank will still owe the depositor twenty dollars — after honoring the*

twenty dollar check — because it cannot establish or identify the exact dollars?

The state courts unqualifiedly accepted the results of the accounting to the effect that, during marriage, the properties of Petitioner earned $84,044.63. *If the accounting did not separate these earnings from the capital, there is no other basis upon which the trial court could have determined the amount of such earnings. It is axiomatic that when an accounting separates earnings from capital, the accounting has traced the respective rights of persons in and to the earnings or the capital based on their type of ownership.* The state courts further recognized the truth of the accounting which disclosed that all of the earnings had been expended and that a portion of Petitioner's original capital had been withdrawn. The state courts refused to accept the accounting conclusions, which were undenied, in disposing of the property rights of Petitioner and Respondent *because Petitioner could not establish that the exact dollars on hand at dissolution of marriage were the identical dollars she owned at marriage and, therefore, even though all earnings of her properties had been expended, the state courts declared all property remaining to be community and that the separate estate owned by Petitioner at marriage was destroyed.*

This is the *first* time the state courts had placed such an onerous burden of proof upon a married person to establish ownership in a separate estate. *Logan vs. Logan* (State Supreme Court), 156 SW (2) 507; *Hartman vs Hartman* (Civil Appeals), 253 SW (2) 480; *Sibley vs. Sibley*, 286 SW (2) 659; *Farrow vs. Farrow*, 238 SW (2) 255; *Andrews vs. Brown* (Adopted by Supreme Court) 10 SW (2) 707; *Humble Oil and Refining Company vs. Texas And Pacific Railway Company* (State Supreme Court), 24 SW (2) 542; *Skinner vs. Skinner*, 202 SW (2) 318; *Barrington vs. Barrington* (Civil Appeals) 290 SW (2) 297.

It must be remembered that at no phase of these proceedings was it contended, or even indicated, that Petitioner had wrong-

fully disposed of or misapplied any of the funds which came into her possession. The decision of the state court has completely rendered Article 4614 of the Texas Statutes (printed in Appendix I, p. 76 hereof) utterly meaningless. This article gave to the wife the right of sole management, control and disposition of her separate property, both real and personal. *The state courts in this case have held that her exercising such statutory rights justified the forfeiture of her separate property.* Doing so on the basis that her original dollars were exchanged with other dollars and, thereby, lost their identity for purposes of establishing ownership. Such a forfeiture destroys the negotiability of the dollar as regards the owner who wishes to retain ownership. *If money cannot be used as a medium of exchange — free from forfeiture — then money which is the separate property of a married person, is worthless — unless that person is willing to risk forfeiture.*

The principles involved here turn on fundamental constitutional concepts regarding the right to own, use and enjoy property and what constitutes a fair exercise of due process of law in judicial proceedings in a state court. The questions strike at the very roots of our constitutional concepts of property rights and judicial proceedings in order to preserve to the individual the constitutional guarantees contemplated by the constitutional declarations.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SIMPSON CLAYTON & FULLINGIM
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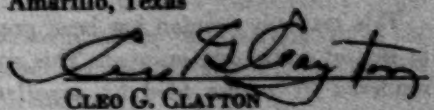
Attorneys for Mary Hare Stanley

PROOF OF SERVICE

I, Cleo G. Clayton, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of May, 1957, I served copies of the foregoing Petition for Writ of Certiorari on Respondent by mailing copies thereof in duly addressed envelope, with adequate postage prepaid, to his attorneys of record as follows.

C. J. Humphrey
Sanders, Scott, Saunders & Smith
Amarillo Building
Amarillo, Texas



CLEO G. CLAYTON

APPENDIX A

MAJORITY OPINION OF COURT OF CIVIL APPEALS

No. 6610

Mary Hare Stanley, *Appellant*

vs.

Theodore Hawkins Stanley, *Appellee*

September 24, 1956

This majority opinion has been prepared for announcement in lieu of a minority opinion. This appeal is from a judgment rendered in a case filed by appellant, Mary Hare Stanley, against appellee, Theodore Hawkins Stanley, seeking a divorce and an adjudication of property rights between the parties. No children were born to the marriage. The case was tried to the court without a jury and judgment was rendered granting appellant a divorce and dividing the property between the parties by awarding appellant approximately two-thirds of the property, except for the sum of $6,711.30 which was separately traced into the home hereinafter mentioned and which the trial court awarded to the appellant as her separate property, and by awarding to appellee approximately one-third, after deducting the sum of $6,711.37 from the total value of the property as appellant's separate property. Appellant perfected an appeal to this court but complains here only about the division of the property. No complaint is here made by either party about the issue of divorce.

In her points presented appellant charges in effect that the trial court erred in finding and concluding that appellant had forfeited her right to her separate estate owned by her before her marriage to appellee; that the trial court erred in applying

the doctrine of co-mingling of property in this case and in concluding that the property in question, except for the sum of $6,711.37, was community property between the parties and that appellant was charged with the burden of proof in establishing her rights, if any, to any separate property she claimed; that the trial court abused its discretion in adjudicating the rights of the parties in connection with the property awards; that the trial court erred in finding that appellee did not, by his acts, consent, acquiescence and conduct, give to appellant as her separate estate all of the income, rents and revenues, increases and earnings, realized from her separate property during the marriage of the parties; that the trial court erred in its failure to find that appellee was indebted to the separate estate of appellant by reason of loans made to him by appellant out of her separate estate; and in effect that the evidence did not support the material findings of the trial court.

Appellee joins issue with appellant on the assignments presented and likewise files cross assignments complaining because the trial court found and concluded that the sum of $6711.37 was separate funds of appellant's and because it failed to charge against any separate estate found to belong to appellant the sum of $4500.00 advanced by the community estate to appellant to pay her income taxes before the marriage of the parties.

In its judgment the trial court described the property here involved and at the request of appellant made and filed separately its findings of fact and conclusions of law, which support the judgment. In its judgment it listed the properties and their agreed values as follows:

"In possession of T. H. Stanley	*Values*
Cowboy Cafe, Canyon, Texas	$ 9,350.00
Equity in 1955 Chevrolet Station Wagon	611.86
In possession of Mary Hare Stanley	
Southern Finance Company	10,198.20
Cash in Bank	807.91
Cashier's Check at First National Bank, Amarillo, Texas	5,114.09

Cash in Mrs. Stanley's possession	1,000.00
Home at 1511 Austin, Amarillo, Texas	26,300.00
Cash in Deposit box at First National Bank, Amarillo, Texas	37,500.00
1952 Cadillac Automobile	1,450.00
Traveler's Checks and Cash	400.00
Cash, Money Orders and Traveler's Checks	3,600.00
Total Value	$96,332.06"

After deducting the value of appellant's separate property in the sum of $6,711.37 from the total value of the said sum, property of the value of $89,620.69 remains, which latter sum the trial court found and concluded to be community property between the parties and awarded appellant property of the value of $59,738.80 and appellee property of the value of $29,881.89, finding in support thereof that such a division was fair and equitable. The only real estate shown is the "Home at 1511 Austin, Amarillo, Texas," valued at $26,300.00, which among other property was awarded to appellant. Appellee was awarded the Cowboy Cafe at Canyon, Texas, valued at $9,350.00 and all equity of the value of $611.86 in the 1955 Chevrolet Station Wagon, together with cash in the sum of $19,920.03, and appelant was awarded the remainder of the property. Appellee voluntarily placed in the registry of the trial court a special warranty deed in favor of appellant to the Amarillo home located at 1511 Austin Avenue, valued at $26,300.00 and appellant has placed in the registry of the trial court a cashier's check in the sum of $19,920.03, both placed there subject to order as a result of a final judgment in this case.

The record reveals that the parties were married from August 17, 1949, until on or about September 17, 1954. The trial court found that during the the marriage their properties had earned $84,044.63, which earnings were found to be community property and were mixed and co-mingled with appellant's separate property, except for the sum of $6,711.37, by placing it all together during their marriage in various bank accounts, in a safety deposit box and by investing it in the various busi-

ness enterprises herein mentioned and by withdrawing therefrom and adding thereto large sums at various times without keeping any kind of a record separating the funds much of the time; that because of the mixing and co-mingling of the community property of the parties, during the marriage, with appellant's separate property owned by her before her marriage, her separate property has lost its identity and cannot be traced or identified, except for the $6,711.37 previously herein shown, either by herself or by a certified public accountant who had been employed by appellant for a number of years and was familiar with her accounts and her business operations and who testified for her at the trial; and that the parties by their acts and conduct really treated the purchases of their various properties as community property without specifying that any certain item was the separate property of either spouse. The trial court found further that there was no competent evidence or testimony to support appellant's claims that appellee had given to her the earnings during their marriage or that such were given to her by reason of appellee's acts, consent, acquiescence or conduct, or by reason of estoppel. The court further found that appelant was about 25 years older than appellee and was in failing health and because of these and other disparaties shown she was entitled to more than half of the community property owned by the parties (the record reveals that the appellant was about 65 and appellee was about 40 years of age at the time of the trial).

On a certified question in the case of *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21, 23, in discussing the power vested by statute in the trial court, Judge Greenwood, speaking for the Supreme Court, said:

> "The court pronouncing a decree of divorce is invested with wide discretion in disposing of any and all property of the parties, separate or community, and . . . its action, in the exercise of such discretion, should be corrected on appeal only where an abuse of discretion is shown in that

the disposition made of some property is manifestly unjust and unfair."

The Hedtke case was followed by *Clark v. Cark*, 35 S.W. 2d 189, writ dismissed; *Housewright v. Housewright*, 41 S.W. 2d 1071, writ refused; *Scannell v. Scannell*, 117 S.W. 2d 538; *Hamm v. Hamm*, 159 S.W. 2d 183; *Hendrick v. Hendrick*, 222 S.W. 2d 281, and numerous other cases.

In a divorce action, the trial court shall decree and order a division of the estate of the parties in such a way as it may deem just and right, having due regard for the rights of the parties. *Carle v Carle*, 149 Tex. 469, 234 S.W. 2d 1002. In doing so, the trial court may take into consideration the difference in ages of the parties or any other disparity between the earning powers of the parties, the business opportunities, capacities and abilities and is not required to divide the property equaly. *Venezia v. Venezia*, 227 S.W. 881 and the many other authorities there cited.

It is presumed that all of the property which the husband and wife possess at the dissolution of marriage is community property and the burden to show otherwise is upon the party who alleges to the contrary. *Earnest v. Earnest*, 223 S.W. 2d 681. Such a rule applied to realty acquired during marriage as well as to personal property. *Rippy v. Rippy*, 49 S.W. 2d 494. The presumption of the community character of the property acquired by either spouse during marriage is very strong, and can be overcome only by clear and convincing proof that it belongs to one or the other of them, and the burden of proving its separate character is always upon him who asserts it. *Skinner v. Skinner*, 202 S.W. 2d, 318; *Harkness v. McQueen*, 232 S.W. 2d 629. The fact that at the time of the marriage one spouse had much property and the other had nothing and that during the marriage relation the parties decreased in fortune, will not rebut the presumptions herein mentioned, unless the purchase money or consideration for the property is explicitly traced to

the separate property of the spouse having the original ownership of "much property" previously mentioned. *Rippy v. Rippy*, supra.

With reference to the co-mingling of funds by the husband and wife while married to each other:

> "The law in Texas is to the effect that where separate and community property are so intermixed that the separate property loses its identity and cannot accurately be traced, the co-mingled fund, and property acquired therewith, becomes community property. Stated in another way, where a husband or wife permits his or her separate property to become so co-mingled with community property that it cannot be identified, the separate property co-mingled becomes community property. See Tex.Jur., 10 Yr.Supp. Vol. 5, Sec. 67a, p. 595; *Hudspeth v. Hudspeth*, Tex.Civ. App., 198 S.W. 2d 768; *Coggin v. Coggin*, Tex.Civ.App., 204 S.W. 2d 47; *Gorman v. Gorman*, Tex.Civ. App., 180 S.W. 2d 470; *Moore v. Moore*, Tex.Civ. App., 192 S.W. 2d 929; *Rippy v. Rippy*, Tex.Civ.App., 49 S.W. 2d 494; *McGarraugh v. McGarraugh*, Tex.Cix. App., 177 S.W. 2d 296; *Walker-Smith Co. v. Coker*, Tex.Civ.App., 176 2d 1002." *Odle v. Odle*, 272 S.W. 2d 381.

The record before us reveals that at the time of her marriage to appellee appellant owned certain properties consisting in part of interests in loan companies identified as Southern Brokerage Company, Local Finance Company, Plains Finance Company and Texas Management Company, and had a bank account and maintained a safety deposit box at her bank. After her marriage to appellee, appellant and her employees continued to manage her property and she kept her bank account and maintained her safety deposit box, during which time the earnings or proceeds from her properties amounted to $84,044.63. The record also reveals that during appellant's marriage to appellee the status of the property changed to that previously herein listed, during which time she drew monies from one or more of the said loan companies and placed them in either the safety deposit box, her bank account or in other companies or invest-

ments and did thereafter take money out of the safety deposit box or her checking account in the bank or one or more of the business enterprises and interchange the said funds between the said businesses, bank account and safety deposit box, thus mixing all of the said monies together with the earnings and profits in the sum of $84,044.63 realized during marriage.

Under the rules of law cited, appellant was charged with the burden of tracing and proving her separate funds before such could be awarded to her. This she failed to do, except for the $6,711.37 awarded to her as her separate property. On the contrary, she testified in effect that she could not trace the various monies from the safety deposit box, the bank account or business investments being often transferred from one to the other. She also testified that she had some of the property before marriage and acquired some of it while she was married to appellee, but she claimed ownership of all of it "because I made every dime of it myself." She seemed to think the property was all hers regardless of the law governing the co-mingling of separate funds with community property. The testimony reveals that no record was kept of money transferred from the safety deposit box or from one account or business to another except for notations made on two envelopes from May 20, 1948, to June 7, 1951, and none was kept thereafter. The notations kept on the envelopes constituted a crude sort of method that could be explained or partially explained only by appellant. The record reveals that monies in various amounts were placed and withdrawn from the safety deposit box at various times during the marriage. At one time there was approximately $64,000.00 in the safety deposit box and large amounts were placed in and withdrawn therefrom at various times. There was cash in the sum of $37,500.00 in the said box at the time of the trial.

Appellant's accountant, Elmer M. Likes, testified that he did not audit the funds kept in the safety deposit box but he had to take the statement of someone else of the various amounts kept

therein. He further testified that the safety deposit box was used as a "grab-all" sort of a place to put money in and take it out at various times. The witness, Likes, further testified that he was a certified public accountant and had been working for appellant at various times since September, 1947; that he had recently checked and audited her business affairs but upon cross examination concerning the property previously herein listed he could not trace the source of the money on hand and was unable to testify that any of the property listed was purchased by money that appellant had before her marriage to appellee. He several times testified concerning these various items; when asked where the money came from that purchased them, he answered to the effect that he did not know. No other witness made an attempt to trace the separate funds of appellant, except for the $6,711.37 previously herein mentioned, and there was no evidence of any nature tracing such funds or identifying them.

Appellant charges that the evidence was insufficient to support the trial court's findings. The test the sufficiency of the evidence to determine if it will support the trial court's findings we must give credence only to the evidence and circumstances favorable to the findings and disregard all evidence and circumstances to the contrary. It is likewise the rule that the findings of the trial judge where there is no jury will not be disturbed by an appellate court where there is some evidence of probative force to support the findings, even though the evidence may be conflicting and the Court of Civil Appeals might have reached a different conclusion. It is a well settled rule that the trial court's findings of fact will be upheld unless they are manifestly erroneous and they will be overruled only when they are without any evidence of probative force to support them or where they are so against the great weight and preponderance of the evidence as to be manifestly wrong. *Boston v. Rainwater*, 197 S.W. 2d 118 and other authorities there cited; *Kelly v. Applewhite*, 231 S.W. 2d 974; *Banks v. Collins*, 152 Tex. 265, 257 S.W. 2d 97.

We find no proof, or at any rate none of probative force, showing or tending to show that appellee gave to appellant the property earnings here involved during their marriage either directly or by his acts, conduct or acquiescence, or that any loans were made to appellee by appellant. Neither do we find where the trial court forfeited appellant's rights to her separate property either by judgment, conclusion or a finding of fact. The trial court merely found and concluded that appellant commingled her separate property with community and failed to discharge the burden of proof in tracing and keeping separate any property she may have had when she was married to appellee, except for the $6,711.37.

Applying the rules of law to the facts presented here, it is our opinion that there is sufficient evidence to support the material findings made by the trial court. It is our opinion further that appellee's cross assignment of error should all be overruled.

The appellate courts of this state will presume, upon the appeal of any case, that the judgment appealed from is correct unless the contrary is made to appear affirmatively from a proper record of the proceedings had in the trial below. *Smothers v. Gawlik*, 214 S.W. 2d 894, 3 Tex.Jur. 424, Secs. 302 and 303; *Bennett v. Jackson*, 172 S.W. 2d 395; *Erback v. Donald*, 170 S.W. 2d 289. In attempting to show affirmatively that an error exists as reflected by the record, appellant must be guided by the rules of law and of equity applicable to the record produced. In our opinion appellant has failed to show any reversible error committed by the trial court.

The statement of facts is unduly voluminous, containing many argumentative statements made by counsel and other statements made by the trial court, making some portions of the record confusing. However, applying the rules of law herein cited to a careful examination of the record, we believe the trial court did not abuse its discretion and its judgment should be affirmed.

Appellants points to the contrary are all overruled and the judgment of the trial court is affirmed.

PITTS, C. J.

APPENDIX B

DISSENTING OPINION

The writer of this dissent originaly drew this cause on appeal. The opinion prepared for the court was rejected by Chief Justice E. L. Pitts, who wrote the majority opinion herein which was later approved by Associate Justice E. O. Northcutt. The opinion as originally written by the undersigned, with some additions thereto, now becomes a dissenting opinion.

An incorrect statement of the record as found in the majority opinion should be first corrected. The majority opinion states:

> "The trial court found that during the marriage *their properties had earned $84,044.63*, which earnings were found to be community property . . . "

The trial court's findings of fact reveal the following:

> "6. That the plaintiff, prior to her marriage to the defendant, operated and managed said finance companies, either as sole owner or as a partner and that following the marriage to defendant there was no change in her manner of the operation of said finance companies.
>
> 9. That during the marriage of the parties, a profit of approximately *$84,044.63 was made from the aforesaid finance companies.*" (Emphasis added.)

The cause here in issue is one where the sole contention of even the appellee himself is that appellant's earnings became community property and were so mingled with her separate capital that she must forfeit one-half of her remaining capital after all community earnings had been expended.

The majority opinion has so wholly submerged the basic facts in this litigation as to gloss over the fact that the judgment in the cause is one to shock the conscience of any court. Further, the basic principle in the cause has not been directly ruled upon by any court in the state of Texas. The appellant, a former career army sergeant without funds or employment, married appellee, a former school teacher who had built up an excellent

business and income in the field of financing. The record reveals that appellant owned four finance companies prior to the time she married appellee. The marriage was in existence from August 17, 1949 until the third day of November, 1955. At the time of granting of the divorce, appellant was sixty-five (65) years of age, in ill health and unable to work, while appellee was a robust man forty (40) years of age.

The appellant produced a Certified Public Accountant as a witness and this accountant gave a complete audit of all appellant's business and affairs. The correctness of this audit and the fact that the trial court approved the entire audit by his findings of fact is established under well-recognized accounting principles. In his finding of fact number 9, the trial court accepted and found as a fact from the audit that during the marriage of the parties a profit of approximately $84,044.63 was made from appellant's finance companies. In his finding of fact number 10, the trial court likewise accepted from the audit the fact that during the marriage over $123,000 of capital was added to the aforesaid finance companies and over $248,000 was withdrawn from said finance companies. It is an established accounting fact and mathematical principle that if the sum of $84,044.63 was a correct statement of the profit from the finance companies as shown by the audit of the Certified Public Accountant, and as so found by the trial court, then every other item in the audit must have been necessarily accepted by the trial court. It is elementary that the profits shown by an audit are based on all the underlying items of the audit, such as expenses and other like items and that the rejection of any item of the audit would effect a change in the profit as shown and throw the audit out of balance.

The above audit was the only one produced in the trial of the cause and it reveals without dispute that the apellee in a period of about six years not only dissipated all the profits realized by appellant from her finance operations in the amount of $84,044.63 but further dissipated $41,911.13 of the original capital ap-

pellant had invested in such companies. On this record of achievement, the Court of Domestic Relations awarded to appellee the Cowboy Cafe as purchased with appellant's funds and of a value in excess of nine thousand dollars, the equity in a 1955 station wagon and also gave appellee the sum of $19,985.93 in cash — a total of $29,881.89 being awarded to the apellee sergeant.

The sole issue in the cause, as viewed in this dissent, is whether a complete and uncontroverted audit by a Certified Public Accountant of a cash estate and its earnings in cash is sufficient segregation of the community cash earning from the separate funds and cash as owned by the appellant and used in the production of income. Not a single Texas case has been cited, or can be found, where the courts have held that a married woman must forfeit one-half of her separate estate under the theory of co-mingling of community and separate funds where such married woman has produced a complete audit revealing every transaction with reference to her funds and financial affairs during the entire period of the marriage. This dissent is based upon the proposition that where a complete audit by a Certified Public Accountant is produced revealing all transactions involving a married woman's estate consisting of cash funds and where the trial court itself has accepted from said audit the community profits earned by the married woman's finance companies and funds that this is a sufficient segregation of the married woman's separate funds from her community earnings and that a forfeiture of her separate estate and funds to appellee by the trial court was a gross abuse if discretion in this cause. This is particularly true where such audit reveals not only that all the community profits earned by a wife's separate funds have been dissipated during the marriage but also that an additional amount of the wife's capital in the sum of $41,911.13 had likewise been dissipated.

There has been a half-hearted attempt in the cause to say that the audit does not reveal all the transactions or is not a complete

audit and that the trial court was unable to trace the funds in his findings. Any such finding has no basis in the evidence or audit. The trial court revealed that he did not have sufficient knowledge or training to refute the audit as given by the Certified Public Accountant:

> "THE COURT: Well, go ahead. I don't know about bookkeeping. Go ahead and explain it."

The trial court also reproved appellant's attorney as to examination of the auditor and thereby revealed the further fact that the court relied entirely upon the auditor and the testimony of the auditor.

> "THE COURT: This is what this man is here for. He is an expert. He is here explaining — no body except an accountant could figure out — I will overrule the objection."

The above statement is a direct approval of the testimony of the auditor and of his audit and was made by the court during the trial and is found in the statement of facts. The trial court in his findings of fact also approved the major items comprising the totals as established by the audit. Added to the trial court's repeated recognition of the correctness of the detailed audit is the admission of apellee's attorney found in the statement of facts which admission also wholly concedes the completeness of the audit:

> "Q: (By Mr. Humphrey) Now Mr. Likes, you have made a complete and exhaustive audit of these four companies and the Mary Montgomery bank account, haven't you?
>
> "A: Yes.
>
> "Q: And you answer that you are not able to tell us is simply because the funds have been deposited and redeposited and withdrawn and expended in such a manner that it is impossible for either you or anyone else to determine that fact?
>
> "A: We are talking about the same dollars.
>
> "Q: Yes, how much was spent of money that she had on

hand before she married and how much was spent out of earnings during marriage or any of these various items contained in the audit it is impossible to tell.

"A: The exact dollars cannot be identified."

It is apparent again and again in the record that the auditor, while stating he was unable to identify the exact money or funds, completely traced and segregated each and every item both of separate funds and community earnings through his audit. It likewise is apparent from a sound examination of the record that the auditor, in answering the questions propounded by appellee's counsel and by the court as to identifying specific funds, trusted to the insight of the courts to draw the distinction clearly found in his testimony — that the monetary interest and items could be, and were, clearly traced by the audit without the necessity of identifying the specific original funds.

The theory of the appellee as approved by the trial court and as affirmed in the majority opinion will now be detailed together with such facts as are necessary to an understanding thereof.

Appellant, prior to her marriage to appellee, owned finance companies and cash assets of the admitted value of $85,954.29. An examination of the Certified Public Accountant's audit of appellant's finance companies as to the period of time she was married to appellee reveals the following major items. During such marriage, a period of approximately six years, the finance companies owned by appellant realized profits in the amount of $84,044.63. Capital additions were made in the amount of $123,017.73. The total sum of $248,974.29 was withdrawn from such companies during the marriage. These figures were accepted as correct by the trial court and appear in his findings of fact. Such findings alone reveal that the withdrawals during the marriage exceeded all additions of capital as well as all profits.

Appellant introduced in evidence the complete audit of her finance companies revealing the above stated items and also

covering her income and expenditures during the entire period of the marriage. Such audit reveals that she and her spouse dissipated all the profits of her finance companies in the amount of $84,044.63 and also expended $41,911.13 of the capital appellant had invested in such companies at the time of her marriage. The undisputed evidence further reveals that while appellee was dissipating appellant's capital and earnings he contributed nothing to the financial status of the family or to its upkeep. Appellee did permit appellant to take credit on her income tax payment for a loss incurred by him in one of his business ventures. Having contributed nothing financially to the marriage, it is appellee's sole contention that appellant so mingled the profits of her finance companies with her original capital investment in the companies that the original dollars or money owned by appellant prior to her marriage could not be identified and he was therefore entitled, under the theory of co-mingling of community and separate property, to one-half of all appellant's remaining capital and funds as held by her at the termination of their marriage.

The trial court accepted appellee's theory of co-mingling of funds in the face of the undisputed audit in the record which revealed in detail the conduct of appellant's finance companies together with all financial transactions, receipts and disbursements by appellant in relation to her business and income. Wholly on this theory of co-mingling, the trial court awarded to appellee the Cowboy Cafe purchased with appellant's funds and of a value in excess of nine thousand dollars, the equity in a 1955 Chevrolet station wagon and also gave appellee the sum of $19,895.03 in cash, a total of $29,881.89 being awarded to the appellee. The appellant was left with the home acquired by her funds and with one finance company of the approximate value of ten thousand dollars and other non-revenue bearing property. Although appellant had sold three of her original finance companies and retained one of such companies of the approximate value of ten thousand dollars, the sale price of

three companies and the value of the company still owned by appellant were lumped off by the trial court as community property and divided along with all other properties — ⅔ to appellant and ⅓ to appellee under the court's summary of values. This unequal division was decreed by the trial court as "just and right" upon the evidence that appellant was 65 years of age, in ill health and unable to work while appellee was a robust, ex-army career sergeant of the age of 40 years. However, appellee obtained the only appreciable income producing business listed in the assets as well as a large amount of the cash funds of the appellant.

Appellee's theory of co-mingling as accepted by the trial court should be examined in the light of the record. Such theory as followed by the trial court in forfeiting to appellee the above property and cash is best illustrated by an inquiry of appellee's counsel as follows:

> "Mr. Humphrey: He can answer it 'yes' or 'no'; *is it money that they had before they were married* or it is money that has come through here * * * " (Italics added.)

Such theory is further high-lighted by the following exchange between opposing attorneys in the cause. Following the above quoted statement by appellee's counsel, appellant's counsel stated:

> "The reason I say that is he is asking the accountant to say that is the same dollar that was in the original bank account that is the same dollar today without asking the accountant whether or not he can trace the monetary interest of the community * * * "

Answering this proposition, counsel for appellee stated:

> "We are not interested in the monetary interest."

The trial court recognized that the cash withdrawals from the finance companies which were continued until all profits were exhausted constituted community profits and not capital. This principle as recognized and accepted by the trial court is one of the basic elements of appellant's case. The follow quotation

from the record reveals the fact that the trial court recognized this basic principle:

"A: (Witness, the Certified Public Accountant) I would not say that it is an assumption. It is an accounting theory. In other words, you will have to go back which comes first, the chicken or the egg?

THE COURT: I had the impression that when people drew money out of companies like that, they first take out their profits rather than their capital.

A: That is what I am saying now.

THE COURT: I thought you were saying just exactly the reverse of it."

Only this one auditor appeared as a witness and the trial court recognized the conclusiveness of his testimony. But, the trial court either did not follow through the testimony of the auditor or failed to recognize the clear import of his testimony and the conclusiveness of the audit. The auditor clearly separated the appellant's separate capital from her earnings as community as revealed by his undisputed testimony:

"Q: When you have finished your account there that you have set up, you have shown to the court what the monetary interest she had in capital today.

A: So far as to loan companies are concerned.

Q: That's right; well, that is all she has.

A: That's right.

Q: You can also segregate the amount of income that was made which would be community property.

A: As shown by the audit—

Q: Well, you have done it haven't you?

A: Yes."

The auditor, under interrogation by the court went through each year's earnings and withdrawals revealing not only the expenditure of all the profits of appellant's finance companies but also a large segment of her capital. The divergence between appellant's theory and proof concerning the funds and the appellee's theory is best illustrated by the following question pro-

pounded by appellee's counsel and by the auditor's reply thereto:

"Q: Yes, how much was separate of the *money that she had on hand before she married* and how much was out of earnings during marriage on any of these various items contained in the audit, it is impossible to tell?

A: *The exact dollars cannot be identified.*" (Italics added.)

The nature of the trial court's and the appellee's haranguing of the auditor is revealed by the auditor's testimony:

"A: I have answered that ten times for you.

Q: All right.

A: And I'll answer it ten more if it will help.

A: What are you after — a final result or a piece-meal result?"

The Certified Public Accountant in his testimony repeatedly pointed out to the appellee's counsel and to the trial court that the specific dollars or money could not be identified as the same dollars or money as originally owned by appellant at the time of her marriage. He testified many times: "I can't identify the dollars." But the auditor's complete audit and breakdown of appellant's capital and earnings and expenditures revealed, without such fact being controverted, that during the few years of appellant's marriage to appellee all the profits earned by appellant's capital as well as a considerable amount of the original capital owned by her at the time of her marriage to appellee had been dissipated. The audit further revealed, without such fact being controverted, that such expenditures left remaining to appellant only a greatly diminished amount of appellant's original capital — her separate property.

The earnings of appellant's finance companies and expenditure of the total earnings of such companies were not only shown by the detailed audit of the accountant but were also revealed by appellee's own testimony with reference to his having shown

appellant a type of extravagant living to which she had never been accustomed. He was a self-acclaimed sport and his testimony reveals a continued outlay of expenditures of appellant's earnings on trips to Havana, Cuba, the Kentucky Derby, the Mardi Gras, Indianapolis Speedway, the World Series and a multitude of other sporting events to which appellee was addicted. Under the testimony of appellee, he clearly revealed to appellant a type of "high living" to which she had not been accustomed but all such outlays of expense were paid for by the earnings of appellant's finance companies and finally by expenditures of her original capital. The evidence is undisputed that after all community earnings and profits of appellant's finance companies were wholly expended and dissipated during the marriage, the appellee then sought to recover a portion of appellant's depleted separate capital. Under the record appellee's love apparently waned in like proportion to his dissipation of appellant's earnings and a large portion of her original capital.

It is the contention of appellee that this cause is clearly governed by *Rippy et al* v. *Rippy*, 49 S.W. 2d 494. The issue here is clearly distinguishable. On page 496 of the cited cause is shown a summary of the issue of property:

> "In the instant case there is no dispute that *all the property in question was acquired during the marriage*, and that at the time the marriage was dissolved by the death of T. E. Rippy all the property was in his or their possession. *The only proof offered* by appellants *tending to show that the property was not community*, but the separate estate of T. E. Rippy, *was that he had a separate estate when he married appellee and that she had no property;* that Rippey's estate was sold, and from 1 to 4 years thereafter the real estate in suit was purchased and the conveyances taken in his name." (Italics added.)

In the cause in issue it is undisputed that at the time of the marriage appellant owned cash assets in excess of $85,954.29. Out of her personal account she contributed to such capital assets

the further sum of at least $99,762.46 as revealed by the undisputed evidence. All additions to and expenditures of appellant's capital and all earnings of such capital and expenditures thereof were shown in detail by a complete audit prepared by the Certified Public Accountant whose audit and testimony detailed each and every transaction. Such detailed audit revealed, without such fact being controverted, that appellee and appellant during the marriage not only expended profits earned by appellant's business in the amount of $84,044.63 but also expended an additional $41,911.13 in excess of such profits and indisputably taken from appellant's capital.

> "The changes and mutations which separate property may undergo by virtue of natural growth and development, or by exchange, can in nowise affect its status . . . Otherwise it would result in the denying to the wife the right to alienate her property for cash or other property, save at the cost of losing it. She could not market her farm products, nor sell her surplus lands, no matter what the emergency; *neither could she lend her money without transferring the principle as well as the interest to the community.* No exchange, however desirable, could be made. Such an absurd state of things is not in consonance with the right to own property." Law of Marital Rights in Texas, Speer, Third Edition, Sec. 426, Page 512. (Italics added.)

No case cited in this appeal requires a married woman to identify the exact dollars or money owned by her at the time of her marriage at the risk of forfeiture of the same to the community if not so identified. Nor is it a sound proposition of law that a married woman by exercising her right to manage and control her separate property as authorized by statute thereby forfeits her entire estate to the community contrary to the facts detailed by a complete audit revealing her original capital and likewise the community earnings and disposition thereof. Although the exact dollars or money as originally owned by appellant prior to her marriage to appellee were not identified as being the same dollars or money as held by her after marriage such a showing does not reveal a co-mingling of community and

separate funds authorizing a forfeiture of appellant's separate estate and capital under the theory of co-mingling of estates. Art. 4614, Vernon's Texas Civil Statutes; *First National Bank of Brownwood v. Hickman et al*, 89 S.W. 2d 838 (writ refused); *Schmidt et al v. Huppman et al* (Sup.Ct.) 11 S.W. 175; *Love and Wife v. Robertson*, 7 Tex, p. 6; *Rose v. Houston and Another*, 11 Tex. 324; *R. B. Spencer and Co. v. Green et ux*, 203 S.W. 2d 957, Syl. 6; *Aultman Miller & C. v. George*, 34 S.W. 652; *Hartman v. Hartman* 253 S.W. 2d 480; *Farrow v. Farrow* 238 S.W. 2d 255.

After appellee had expended all the profits of appellant's finance companies and a large amount of her capital, the fund remaining was appellant's separate capital investment. Such fund being appellant's separate property, any property purchased therewith or in which said fund was invested became her separate property. Accordingly appellant's points One, Three, Four, Five, Seven, Eight and Ten should be sustained. The judgment of the trial court should be reversed and judgment here rendered that appellant recover title and possession of all the property and funds in controversy as described in the judgment of the trial court other than the equity in the 1955 Chevrolet Station Wagon in possession of the appellee for which equity appellee had traded his old station wagon, which equity in and title to said Station Wagon should be vested in appellee as his separate property.

Appellee's cross-assignment should be overruled. In passing on this phase of the case it must be observed that appellee's complaint that appellant's separate estate should be charged with $4,500 advanced by the community to pay appellant's income tax further highlights the gross injustice of appellee's position and claims. Appellee, after receiving judgment for $29,881.89, was still unhappy that appellant might have paid her income tax out of her own individual earnings — which earnings had been squandered by appellee during his marriage to appellant.

The trial court accepted the audit total of $84,044.63 as the correct amount of all community earnings of appellant. Such audit likewise revealed that all such earnings had been dissipated during the marriage as well as an additional amount of $41,911.93 from appellant's capital. Nothing was due the appellee. This sordid record should not encourage the courts to resort to a supertechnical and perverted interpretation of the law in order to award the appellee the further sum of $29,881.89 out of appellant's depleted capital investment.

The opinion hereinabove reveals an abuse of discretion of the part of the trial court. A further abuse of discretion is clearly revealed by the statement of facts. The spectacle of the trial court seeking to either bargain or bluff the appellant out of an appeal from his intended judgment by juggling the unfortunate woman's funds as a medium of exchange presents not only an abuse of discretion but conduct which should shock the conscience of any court. The court's method of arriving at a decision as to dividing up the appellant's funds is revealed by the statement of facts:

> "THE COURT: If I give him less than half of this and it would be appealed you take a chance of losing a good deal more money."

The avarice with which appellee has pressed his asserted claim against this unfortunate woman and the avid adoption of appellee's cause and asserted legal principle by the courts paints a picture of justice under the judicial processes which is not likely to add stature or luster to either the bar or bench.

HERBERT C. MARTIN, A.J.

APPENDIX C

TRIAL COURT OPINION

No. 3783

Mary Hare Stanley, *Plaintiff*, *vs.* Theodore Hawkins Stanley, *Defendant.*	In The Court of Domestic Relations In and For Potter County, Texas

FINAL JUDGMENT

On the 3rd day of November, 1955, pursuant to the previous setting, came on to be heard the above-entitled and numbered cause, wherein Mary Hare Stanley is plaintiff and cross defendant, and Theodore Hawkins Stanley is defendant and cross plaintiff; and the parties appeared in person and by their attorneys of record and announced ready for trial; a jury being waived, the Court considered all matters of law and fact, including full consideration of the pleadings, evidence and argument of counsel, and is of the opinion that the following Judgment should be entered:

The Court is of the opinion that the material allegations for divorce as contained in Plaintiff's Petition are supported by evidence and that the plaintiff, Mary Hare Stanley is entitled to a divorce.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between the plaintiff, Mary Hare Stanley, and Defendant, Theodore Hawkins Stanley, be, and the same are hereby dissolved, and the plaintiff is hereby granted a divorce from the defendant.

The Court further finds that the plaintiff has petitioned for the restoration of her former name, Mary Hare Montgomery,

and the Court accordingly restores to the plaintiff her former name as prayed for, to-wit: Mary Hare Montgomery.

The Court finds that no children have been born as a result of this union in marriage, and that no order or judgment need be entered concerning this matter.

The Court further finds that there is considerable estate consisting of real property, personalty and cash, which said property consists of the following and is of the value set opposite thereto:

In Possession of T. H. Stanley	*Values*
Cowboy Cafe, Canyon, Texas	$ 9,350.00
Equity in 1955 Chevrolet Station Wagon	611.86
In Possession of Mary Hare Stanley	
Southern Finance Company	10,198.20
Cash in Bank	807.91
Cashier's Check at First Nat'l. Bank, Amarillo, Texas	5,114.09
Cash in Mrs. Stanley's Possession	1,000.00
Home at 1511 Austin, Amarillo, Texas	26,300.00
Cash in Deposit box at First Nat'l Bank, Amarillo, Texas	37,500.00
1952 Cadillac Automobile	1,450.00
Traveler's Checks and Cash	400.00
Cash, Money Orders and Traveler's Checks	3,600.00
Total Value	$96,332.06

All of the values set forth above have been agreed to by counsel for both the plaintiff and defendant in open court.

In connection with the above-described property, the Court expressly finds that all of said property is the community property of the plaintiff, Mary Hare Stanley, and the defendant, Theodore Hawkins Stanley; that the parties, during their marriage, have earned in excess of $84,000.00, which earnings were placed in various bank accounts, in a safety deposit box, in cashier's checks and in cash; that large sums of capital were

withdrawn from the finance companies operated by the plaintiff during her marriage to the defendant and that large sums were added to the capital of said finance companies by the plaintiff; that approximately $66,000.00 was placed in the safety deposit box at the First National Bank in Amarillo, Texas, from time to time after the marriage of the parties hereto, and that after June, 1951, no record of any kind was kept or maintained by the plaintiff of the funds and monies placed in and taken out of said safety deposit box; that the plaintiff, Mary Hare Stanley, so intermixed and co-mingled the community property with any separate property which she may have had prior to her marriage to the defendant so that the separate property has completely lost its identity and cannot be identified or traced.

The Court further finds that the plaintiff, Mary Hare Stanley, has been able to trace the payment of $6,711.37, which was paid out of her separate property and invested in the residence at 1511 Austin, Amarillo, Texas, and it is accordingly ordered, adjudged and decreed that there be set aside to the plaintiff as a credit out of the above community estate, the sum of $6,711.37, thereby leaving a net community estate to be divided between the plaintiff and the defendant, property of the value of $89,620.69.

The Court expressly finds that there is no competent evidence or testimony which supports the plaintiff's contention that the defendant has made gifts to the plaintiff of the earnings made during the marriage of the parties hereto, and the Court further finds that the defendant did not, by his acts, consent, acquiescence and conduct, either make gifts to the plaintiff of said community earnings, nor did the defendant in any way estop himself from claiming his part of the community properties earned and accumulated during the marriage.

The Court further finds that the plaintiff is about twenty-five years older than the defendant, and that the plaintiff has had

at least one serious operation, has been in failing health, and for these and other equitable reasons, the Court finds that the plaintiff, Mary Hare Stanley, is entitled to more than an undivided one-half of the community property and estate, based on the values as is shown above. The Court finds that an equitable division of the remaining community property of the value of $89,620.69 would be obtained by awarding to the plaintiff, Mary Hare Stanley, approximately two-thirds of said community estate, and awarding to the defendant, Theodore Hawkins Stanley, one-third of said community estate. In this connection, the Court is cognizant that he cannot divest the title to the real estate out of either of the parties hereto, and finds that the defendant has voluntarily placed into the registry of the Court a Special Warranty Deed to the property located at 1511 Austin in the City of Amarillo, and described as Lot 19, and the South Half of Lot 20, Bivins No. Two Addition to the City of Amarillo, Potter County, Texas, said Deed being made to Mary Hare Stanley, as her separate property and estate, and being deposited in the registry of the Court subject to the provisions of this Judgment. Likewise, the Court finds that the plaintiff has placed into the registry of the Court a cashier's check drawn on the First National Bank of Amarillo, Texas, payable to Blanche Calhoun, Clerk of this Court, in the amount of $19,920.03, said cashier's check to be held subject to the provisions contained in this Judgment.

IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the defendant, Theodore Hawkins Stanley, shall take as his separate property and estate the Cowboy Cafe and all properties held in connection therewith, which is located at Canyon, Texas; the equity in the 1955 Chevrolet Station Wagon, and $19,920.03 in cash, making a total of $29,881.89.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Mary Hare Stanley, shall first be entitled to the sum of $6,711.37 out of the community pro-

perties as her separate property and estate, same being a credit against the community estate, and that the plaintiff shall further take as her separate property and estate, the full and complete legal title to the residence at 1511 Austin in the City of Amarillo, Texas, being described as Lot 19 and the South Half of Lot 20, Bivins No. Two Addition to the City of Amarillo, Texas, including all improvements located thereon and all furniture and furnishings located therein; the 1952 Cadillac automobile; the interest in the Southern Finance Company of Amarillo, Texas, and all of the remaining cash, cashier's checks, traveler's checks, money in the safety deposit box and all other property in her possession of every kind and character, and being of a value of $59,733.80.

In connection with the foregoing division of the community properties on hand and in the possession of the parties hereto at the time of the divorce, the Court finds that same is fair and equitable, taking into consideration all of the facts, testimony and circumstances as shown by the trial of the case on its merits. Further, in this connection, the Court expressly finds that there was no showing of loans or advancements made to the defendant out of the separate property or estate of the plaintiff, and that if there were any loans or advancements, same were made out of the community estate of the parties hereto and were accounted for between the parties as is reflected in their joint income tax returns. Furthermore, in this connection, the Court has accepted the value of $26,300.00 for the residence, furniture, and all improvements and additions thereto, and has awarded same to the plaintiff based on such value, although the record reflects approximately $20,000.00 additional have been expended in improving the residence and in the acquisition of personal property acquired and now in possession of plaintiff. The Court finds that this more than offsets any claim of advancements or loans to the defendant, Theodore Hawkins Stanley, and further follows the equitable and unequal division of the community properties hereinabove made by this Court.

It appearing to the Court that the plaintiff, Mary Hare Stanley, has deposited with the Clerk of this Court, a Cashier's check payable to said clerk in the amount of $19,920.03, being the amount of cash decreed to the defendant, Theodore Hawkins Stanley, in addition to the property herein decreed to him;

It further appearing to the Court that upon deposit of said check with the clerk, all of the balance of the community property decreed to the plaintiff, Mary Hare Stanley, of the value of $59,738.80, was delivered to her without any security being required of her;

It further appearing to the Court that the plaintiff has given notice and announced her intention of appealing this case to the Court of Civil Appeals, and it further appearing to the Court that the said $19,920.03 was paid to the clerk of this court by agreement in order to secure the defendant in the payment of $19,920.03 decreed to him herein without the necessity of plaintiff giving a supersedeas bond in order to stay execution pending such appeal;

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED that if this judgment becomes final by reason of plaintiff's failure to perfect said appeal or if this judgment is affirmed by an appellate court, then, in either event, the clerk of this court is ordered to deliver $19,920.03, or so much thereof as is necessary to comply with any judgment of an appellate court in this case, to the defendant, Theodore Hawkins Stanley. Likewise, and on the same conditions, the clerk of this court is ordered to deliver the deed from the defendant to the plaintiff conveying said residential property.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED by the Court that the clerk of this Court shall hold said sum of $19,920.03 until this judgment becomes final or until final judgment has been rendered on the appeal of this case, and should an appellate court order a retrial of this case, that the plaintiff herein, Mary Hare Stanley, shall be charged with community

property of the value of $59,738.80 whether she still has same in her possession or not, and that the defendant, Theodore Hawkins Stanley, shall be charged with the value of the Cowboy Cafe and the Chevrolet automobile having a total value of $9,961.86 whether same is still in his possession or not.

It is the further order of this Court that all costs of court and these proceedings be taxed one-half against the plaintiff, Mary Hare Stanley, and one-half against the defendant, Theodore Hawkins Stanley.

All relief herein prayed for by either the plaintiff and cross-plaintiff and the defendant and cross-defendant which is not herein expressly granted, is, in all things, denied, and refused.

For all of which let execution issue as provided by law.

ENTERED this, the 5th day of November, 1955, to which Judgment of the Court, the plaintiff, Mary Hare Stanley, in open court, duly excepted and gave notice of appeal to the Honorable Court of Civil Appeals for the 7th Supreme Judicial District of Texas, sitting at Amarillo, Potter County, Texas.

F. H. McGaughon
Judge Presiding

APPENDIX D

CERTIFICATE OF ACTION OF SUPREME COURT OF TEXAS

In The Supreme Court of Texas

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify from the records in this office, that in the case of Mary Hare Stanley vs. Theodore Hawkins Stanley, No. A-6109, on January 30, 1957, the Supreme Court refused the application for writ of error by making the following notation: "Refused — No Reversible Error." I further certify that no written opinion was delivered by said Court.

AND I further certify that in the above case the Supreme Court on February 27, 1957, denied the petitioner's motion for rehearing with the notation "Overruled", and no written opinion was delivered by said Court.

IN TESTIMONY WHEREOF, Witness my hand and the seal of said Supreme Court of Texas, at the City of Austin, this, the 14th day of March, 1957.

/s/ Geo. H. Templin

Geo. H. Templin, Clerk
Supreme Court of Texas

(SEAL)

APPENDIX E

RULE 483, VERNON'S ANNOTATED TEXAS RULES OF CIVIL PROCEDURE, VOLUME 3, PAGE 440

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused". In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error". In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of jurisdiction".

In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of error, unless it be in agreement with the decision of the Court of Civil Appeals in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse the same on the application for writ of error, making, at the same time, such further orders as may be appropriate. As amended by order of Oct 10, 1945, effective Feb. 1, 1946; and by order of July 20, 1954, effective Jan. 1, 1955. (Italics added)

APPENDIX F

PETITIONER'S MOTION FOR REHEARING FILED IN THE SUPREME COURT OF TEXAS

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TO THE SAID HONORABLE SUPREME COURT OF TEXAS:

NOW COMES MARY HARE STANLEY, Petitioner in the above numbered and entitled cause, and respectfully moves the court to set aside the judgment or decision of this court rendered on the 30th day of January, 1957, affirming the trial court's judgment and the decision of the majority of the Court of Civil Appeals, WRIT REFUSED, NO REVERSIBLE ERROR, and to grant to her a rehearing on its application for a writ of error and reverse judgment of the trial court and the decision of the Court of Civil Appeals, and by way of substantiation of such motion says:

The Court of Civil Appeals and the trial court erred in each and all of the instances as set forth by Petitioner in her application for writ of error under the various "points" stated. That such errors are reversible errors and that the application presents errors which require reversal. If Petitioner understands Rule 483, the action of this honorable court in WRIT REFUSED, NO REVERSIBLE ERROR, has found that it is not satisfied that the opinion of the majority of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion the application presents no error which requires reversal. Petitioner says that in the event the honorable Court of Civil Appeals has not in all respects correctly declared the law, then it has not, in all respects, correctly disposed of the property rights of Petitioner and Respondent. This is fundamentally a case of property and if the declaration of law as announced by the Court of Civil Appeals is incorrect, then the disposition of Petitioner's property is, of necessity, incorrect. This case presents grave and serious questions as regards the right of a married woman to own, hold and manage her separate property without sacrifice and forfeiture and should be reviewed by this honorable court upon a writ granted.

Petitioner here reiterates and restates and adopts each and all points of error stated in her application for writ of error as

though the same were restated herein, for the purpose of brevity and without waiver of any point stated in the application.

Generally speaking, the points presented by Petitioner are:

1. The common law doctrine of commingling is not applicable to the law or facts in this case and the applicationof the doctrine is erroneous and the resulting forfeiture of Petitioner's separate estate under such doctrine is not only error but an error which requires reversal because:

(a) As stated by this Supreme Court in *Logan vs. Logan*, 156 SW (2) 507, if commingling is done rightfully, the basis for the rule (commingling *is removed, and no presumption is raised that the entire fund, or property purchased therewith is subject to the trust;* * * *" The determination that commingling must be "wrongful" must be made before the commingling doctrine will be applied for forfeiture. Apparently this honorable court does not desire to reverse itself as regards its holdings in *Logan vs. Logan*, Supra, and if this doctrine as announced still prevails, then the common law doctrine of commingling is not applicable to this case because Petitioner's exclusive management and control of her separate estate is not only a "rightful" exercise of her rights over her separate property, but the same are lawful grants of rights given to her by Article 4614 of the Texas Statutes which expressly give to her the right of sole management, control and disposition of her separate property, both real and personal. Further, Article 4616 provides that neither the separate property of the wife nor the rents from the wife's separate real estate nor the interest on bonds and notes belonging to her nor dividends on stocks owned by her nor her personal earnings shall be subject to the payment of the debts contracted by the husband nor of torts of the husband. This article has removed the right of the husband to exclusive management and control of the wife's earnings, rents, interest on bonds and notes belonging to her and dividends on stock owned by her. Under this statutory authority, the wife, in exercising the rights afforded her in managing and controlling her separate estate, must, of necessity, handle the profits and earnings thereof, and in

so doing does not "wrongfully" invade the rights of the husband in such a manner as to justify the application of the doctrine of commingling in determining her property rights in her separate estate. The trial court and the Court of Civil Appeals permitted forfeiture of Petitioner's separate property under the theory of commingling and in so doing not only committed error but deprived Petitioner of her property rights in such a manner as to "shock the conscience" of any court as stated in Justice Martin's dissenting opinion. This error not only requires but *demands* reversal of the trial court and Court of Civil Appeals if there is any such thing as a judicial review under the "due process clause" of the Constitution of the State of Texas. This feature of due process is not one of "procedure" but one which strikes at the very roots of fairness and justice as elements of judicial determination of the rights of Petitioner in and to her property in this case.

(b) The common law doctrine of commingling is not applicable in this case for the further reason that Petitioner all during her marriage to Respondent prudently maintained and on the trial hereof presented a complete and comprehensive accounting as regards the respective interests of Petitioner and Respondent in and to their various property interest. This feature alone removes the basis for the application of the common law doctrine of commingling in this case and the action of the courts below in adopting the commingling doctrine in adjudicating the property rights of Petitioner was not only error in the declaration of the law but resulted in fundamental error in the disposition of the property rights of Petitioner which requires and demands reversal.

(c) Even under the theory of the doctrine of commingling, Respondent would only be entitled to his "contributions" in any commingled fund. Under the facts in this case, accepting the argument of Respondent, the only contribution made by Respondent in the funds commingled would be his one-half of the community funds mingled. The record is undisputed that the amount of community fund commingled was in the sum of

$84,044.63 and that this amount of monies were not only expended during the marriage but likewise an additional sum of $41,911.13 were expended. The courts below have adjudicated the property rights of the parties as though none of the community estate had been expended during the marriage. *This is not only an erroneous assumption but is a non-existant conclusion.* Any contributions (interest in community property) which Respondent made to the funds mingled were expended during marriage, therefore, *he has no funds which he contributed via the community estate existing in the funds on hand because all the community estate had been expended and, therefore, any contribution he made to funds as mingled are expended and he is therefore entitled to no recovery even under Respondent's theory in this case.* The funds he contributed via the community were expended to feed, clothe and furnish him all other necesities and many luxuries, with his full knowledge and consent — if not of necessity; therefore, how can he now complain of these expenditures which furnished him his very life subsistence as a result of Petitioner's efforts and separate estate and now say that because the earnings from the separate estate of Petitioner fed, clothed and furnished him subsistence, the corpus of her estate should now be forfeited to him? Petitioner believes that this court is possessed of a conscience which will not adhere to the claims here made by Respondent. The courts below in adjudicating the property rights of the parties has done so on the basis that all of the profits earned from Petitioner's separate estate have not been expended — this presumption is clearly contrary to all evidence presented during the trial. The courts below in presuming that these parties lived together several years without any expense whatsoever is not only a fallacy on the facts but contradicted by all elements of common sense and such action of the courts below in determining the property rights of Petitioner accordingly presents error of such a nature as to "shock the conscience" of any court, *Even in common law — let alone in equity — which demands reversal.*

(d) Further in considering the propriety of the ap-

plication of the commingling doctrine to this case, it is of vital importance to realize that the commingling, if any, was done "with dollars" in the operation of the businesses which belonged to Petitioner previous to her marriage. Also, that there would have been no community estate created had it not been for the separate estate of Petitioner. The courts below have, in substance, found that Petitioner's separate property *created* the community estate but after its *creation*, the community estate, after its having been identified (by accounting) should destroy the thing from which it was created because during creation it could not be identified until in existence (by accounting). This is nothing more than saying "A child (community property) born of woman (separate estate) during a period of creative process of conception (operations of the separate estate) was so mingled that neither the body of the mother nor the child could be identified as separate entities and therefore upon birth (accounting) the child upon separation from its mother (dissolution of marriage) possesses the lawful right to destroy the mother because of the phase of commingling in the process of creation, birth and established identity." Surely, this court if it had before it on review findings of courts below to the effect that a child, on these premises, could destroy its mother, it is believed this court would grant a writ and reverse the action of the courts below. *The courts below in the case at hand have found that the community estate can lawfully destroy Petitioner's separate estate on the same premises as would the court have based its findings that a child could destroy its mother.* SURELY, THIS COURT WILL, ON THIS RECORD AND UNDER THE CIRCUMSTANCES IN THIS CASE, RECONSIDER THE APPLICATION, GRANT THE WRIT APPLIED FOR, AND REVERSE SUCH ACTION OF THE COURTS BELOW.

The position and argument asserted above by Petitioner is supported by the principles announced in *Hartman vs. Hartman*, 253 SW (2) 480; *Farrow vs Farrow*, 238 SW (2) 255; *Barrington vs. Barrington*, 290 SW (2) 297; *Sibley vs. Sibley*, 286 SW (2) 659. The foregoing

is a general consideration of Points 1, 2, 3, 4 and 5 as stated in the application for a writ.

2. The courts below erroneously charged the separate property of Petitioner with community debts instead of charging community earnings with community debts first and considering withdrawals during marriage as community withdrawals before sacrificing the separate estate of Petitioner. *Barrington vs. Barrington*, 290 SW (2) 297 and authorities cited. (This is germane to Points 7, 8, 10 and 12 stated in the application.)

In Petitioner's application she stated, under Point 29 that the courts below committed error in "presuming that all property on hand at the date of dissolution was community" because such presumption was clearly and satisfactorily refuted by factual evidence and that such a presumption of law "went out the window" when confronted with factual evidence of probative value to the contrary. This honorable court agreed with the contention made by Petitioner in *Janes et al vs. Gulf Production Company* (Writ Refused) (On Rehearing), 15 SW (2) 1107. In the Janes case, Supra, it was stated that "the presumption of law controls *only in the absence of proof*." Upon the coming of "*any*" evidence it disappears. Apparently, this court does not wish to retract this statement and principle as followed in the Janes case; however, if it does not set such principle aside, then Petitioner is entitled to the protection afforded her in her property rights by such principles as announced in the Janes case and in which this court refused a writ of error.

Going further to the seriousness of the strength with which the courts below relied upon "the presumption of law", the courts below have not only completely ignored the constitutional rights of Petitioner in and to her property as declared by Article 1, Section 19 of the Texas Constitution and as declared by the 14th Amendment to the Constitution of the United States, but the courts below by their construction of Article 4619 and its enforcement have rendered such article repugnant to the Constitution of Texas and repugnant to the 14th Amendment of the Constitution of the United States for they have made the effect of

such presumption a divestiture of Petitioner's property rights. It is not believed that the Legislature of Texas intended by Article 4619 to say "upon the dissolution of a marriage, one-half of the property owned and claimed by a married woman at the time of or previous to such marriage shall vest in the husband." This is the effect and enforcement given this article by the courts below. Had the Legislature so spoken, the statute would have been oppressive, arbitrary and capricious and would deprive this Petitioner of her rights in and to her property "without due process of law". All this in violation to the Constitution of Texas and particularly Section 15 of Article 16 which says that the property owner or acquired by her previous to marriage SHALL BE HER SEPARATE PROPERTY EVEN AFTER MARRIAGE; and the statute would be further repugnant to Article 14 of the Constitution of the United States because it would arbitrarily, capriciously and oppressively divest title and ownership in and to one-half of the property owned and recognized as hers previous to marriage and vest the same in the Respondent upon dissolution of the marriage. It is respectfully said that the Legislature did not enact Article 4619 with such purposes in mind nor does the statute say what the courts below say in this respect. *Therefore, the courts below by the construction enforcement and effect given this Article 4619, render the article arbitrary, oppressive and unjust* and by judicial decision in the enforcement of such statute make the same repugnant to the Constitution of Texas and the 14th Amendment of the Constitution of the United States because the courts below "by decision" have made Article 4619 say "one-half of the property owned or claimed by a married woman shall, upon dissolution of the marriage, be divested from her and vested in the husband." Therefore, the State, acting through the declaration of the courts below has by decision, which is arbitrary, oppressive and unjust in divesting a married woman of title and rights in and to her property upon dissolution of marriage and arbitrarily vesting the same in her husband, created a decision or judicial declaration which is repugnant to the 14th Amendment of the Constitution of the United States because the judicial decision deprives Petitioner of her pro-

perty without due process of law. It is respectfully said that the judiciary of the State of Texas has no more authority "by decision" to deprive Petitioner of her property without due process of law than would the Legislature and, therefore, if this court refuses the writ herein applied for, then the State of Texas, acting through its judiciary, has violated the constitutional guarantee of Petitioner in and to her property by divesting her of same without due process of law. This very Supreme Court adopted an opinion written by Judge Critz, writing for the Commission of Appeals, in *Hawkins vs. Britton State Bank*, 52 SW (2) 243. *Let us see what Judge Critz has to say about the contention asserted by Petitioner as regards her property rights.* In referring to Article 4614, he said the statute, in clear and unmistakeable language vests the wife with exclusive management and control of her separate property. That this right certainly includes the sole management and control of the rents (would likewise include earnings) derived therefrom and cites *Emerson Brantingham vs. Brothers*, 194 SW 608. He further said it would be idle to say that the statute intends to confer on the wife the bare right to control and manage the land itself. *but the minute the rents she has contracted have become due, or the minute the rents are collected the husband can take charge and use them to suit himself, all without the wife's consent and against her will.* SUCH A HOLDING WOULD SADDLE THE WIFE WITH ALL THE BURDEN INCIDENT TO THE MANAGEMENT OF HER ESTATE BUT ROB HER OF HER BENEFITS AND RENDER THE STATUTE BUT AN IDLE AND VAIN THING. Judge Critz further said "The Legislature in defining the wife's rights in and to her separate property *and property held in common with her husband could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and portions of the community property which were derived from the use of the wife's separate property or from her personal exertions, and could* CONFINE THE MANAGEMENT, CONTROL AND DISPOSITION THEREOF TO THE WIFE ALONE, AND COULD EXEMPT NOT ONLY HER SEPARATE PROPERTY, BUT PORTIONS OF THE COMMUNITY FROM PAYMENT OF THE HUSBAND'S DEBTS. In making this grant of enlarged rights to the wife and making

the corresponding dimunition in rights to be exercised by the husband, the Legislature was lawfully defining the wife's rights in both her separate estate and *community property as expressly authorized by the Constitution, but the legislature could not* DIVEST *the husband of all interest in and to said property which, under the Constitution, was guaranteed either to the community or the husband's separate estate, and use the same to enlarge the wife's separate estate beyond its constitutional limits.*

Analyzing the statements made by Judge Critz in the *Hawkins* case, Supra, *which was adopted by the court*, the wife had the statutory right to the exclusive management and control of her separate estate AND THE RIGHT TO DISPOSE OF SUCH ESTATE OR THE PERSONAL EARNINGS OR RENTS OR INCOME THEREFROM. *In exercising her statutory right to* DISPOSE OF EARNINGS FROM HER SEPARATE ESTATE, as announced by Judge Critz and adopted by this Supreme Court, does this court now desire to set aside its adoption of the statements of Judge Critz and say that this Petitioner in *disposing of her earnings from her separate estate, as authorized to do by the statute, is a "wrongful" disposition thereof to justify forfeiture of her estate under the commingling doctrine?* Surely the Legislature cannot grant the Petitioner the right to dispose of her personal earnings and this honorable court in the next breath say her so doing is unlawful and wrongful and she thereby forfeits her separate estate. It is respectfully said that to do so would "rob" this woman of her separate property contrary to the statutes and Constitution of the State of Texas.

Further following the principles adopted by this honorable court in the *Hawkins* case, Supra, Petitioner's property rights in and to her separate estate owned at time of marriage cannot be divested from her and vested in Respondent on the "presumption of law" theory as adopted by the courts below without setting aside this court's adoption of the *Hawkins* principles and reversing the principles therein announced. *Apparently, this court does not so desire.* Petitioner is entitled to the rights as declared to be hers in the principles announced in the *Hawkins* case, and she here insists upon the same unless this court wishes to

set aside the principles heretofore adopted by it and automatically and arbitrarily, by "presumption of law", divest her of title to her separate estate and vest the same in Respondent without the due process of law guaranteed her by the Constitution of Texas and the 14th Amendment to the Constitution of the United States which prohibit the taking, by judiciary act or legislative act, the property rights of Petitioner without due process of law and, as stated by Judge Critz, "rob" her of the same.

Looking further to the seriousness of the error of the courts below in their staunch reliance upon the presumption that all property on hand at dissolution of marriage is community property, let us further analyze the effect of the decision of the courts below.

It is respectfully urged that the Legislature of Texas intended that the presumption would be one of evidence. The courts below make this presumption more than a rule of evidence. The courts below have, in effect, said the presumption divests Petitioner of her right and title in and to her separate estate in spite of factual evidence refuting the presumption that the property is community. This action on the part of the courts below likewise is repugnant to the statutes and Constitution of the State of Texas and the 14th Amendment to the Constitution of the United States of America because the weight given such presumption of law is erroneous because the undenied evidence of fact existing in this record refutes such presumption. In spite of the abundance of factual evidence which refutes this presumption, the courts below ignored the record and held that, as a matter of law, the separate estate of Petitioner vested in Respondent. The 14th Amendment of the Constitution of the United States in saying that Petitioner shall not be deprived of her property without due process of law meant more than to say that opening the doors to the courthouse afforded her due process of law. Due process of law as afforded her goes further than the mere opening of the courthouse doors. It demands a full and complete opportunity to be heard, and this was not accorded Petitioner in the courts below because in affording her an opportunity to be heard they ignored all undenied evidence in the hearing refuting the presumption of law and made the hearing

a farce and mockery by ignoring the hearing and relying solely upon a presumption of law which, under all previous holdings of this court and other courts of the state, were destroyed and entitled to no credence upon the establishment of factual evidence during such hearing refuting the presumption of law. This type of hearing does not accord the Petitioner her due process of law in protection of her property rights as accorded by the Constitution of Texas and the 14th Amendment of the Constitution of the United States and unless the Constitution of Texas and the 14th Amendment of the United States Constitution are to be destroyed, this honorable court should be constrained to reverse the action of the courts below and hold that the same are contrary to and repugnant to the Constitution of Texas and the 14th Amendment to the Constitution of the United States.

Further, if Article 4619 was enacted by the Legislature with the intent and purposes to be enforced as the courts below are enforcing the same, then the article is further repugnant and unconstitutional and is contrary to the Constitution of the State of Texas and the 14th Amendment to the Constitution of the United States because it does not grant equal protection of law to a married woman as compared to a single woman. It may be said that sexes may be proper basis for classification of persons: however, it cannot be said that as among female persons, the right to own and hold property shall differ as regards the separate estate of a married woman and the property of a single woman. In *Alexander vs. Alexander*, 140 Fed. Supp. 925, the Federal District Court clearly stated the constitutional rights of Petitioner when it said as follows:

> "Section 1 of the 14th Amendment of the Constitution of the United States is as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor

deny any person within its jurisdiction the equal protection of its law.' "

The Supreme Court of the United States has held that the term "person" is broad enough to include any human being who is a citizen of the United States. *Wong Wing vs. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 Law Ed. 140.

> "Not only does the Constitution of the United States in the use of the word "person" include all individuals, but the laws of the United States make the same provision by providing that, in construing the statutes of the United States, words importing the masculine gender include the feminine gender and that the word "persons" includes individuals. 1 U.S.C.A., Section 1."

The Constitution and laws of the United States recognize that a *married woman is a person and individual and that she is entitled to the same protection of law as other individuals regardless of ancient provisions of the common law.*

As announced in *Alexander vs. Alexander*, Petitioner, even though a married woman, is entitled to equal protection of law as compared with a single woman. If the Legislature in enacting Article 4619, made such a legislative enactment, as interpreted and enforced by the courts below, then such statute is unconstitutional as being arbitrary, carpricous and oppressive in divesting Petitioner of her separate estate and vesting the same in Respondent upon dissolution of the marriage and does so without due process of law. This is an unequal protection of the law because a single woman cannot be so arbitrarily, capriciously and oppressively deprived of her property rights without due process of law. This court should so hold and reverse the action of the courts below.

3. The courts below further comitted error which *requires* reversal of this case for the reason, as raised in Points 6, 7, 8 and 12, that the evidence is undenied that Petitioner made certain withdrawals of substantial amounts of money from funds in her hands and delivered the same to Respondent who made no accounting therefor whatso-

ever nor made any effort to explain the disposition of such funds. These advances were made to him during the marriage of Petitioner and Respondent, and should be considered as withdrawals by him of community funds. We speak particularly of the funds withdrawn and delivered to him which Petitioner considered were "loans", but if Petitioner be in error as to the legal question regarding the same as being "loans", then such monies delivered to him should be considered as community funds and he should be charged therefor in adjudicating the property rights of Petitioner and Respondent. This the court below failed to do and in so failing to do, deprived this Petitioner, by serious error, of her property right. As stated in *Baker vs. Walker*, 89 SW (2) 797 and by the Supreme Court in *Rutherford vs. Dever*, 235 SW 853, "Advances to persons entitled to receive money or property out of a community estate are presumed, in absence of contrary showing, to have been delivered from such community, *and persons asserting contrary have burden of proof.*" *It is further respectfully urged that under the Baker vs. Walker and Rutherford vs. Dever pronouncements, all the community funds held by Petitioner during the marriage, which were expended, are presumed — as regards Respondent — to have been expended for the community (his benefit also) unless Respondent, who asserts to the contrary, proves to the contrary, and the burden of proof rests upon him.* Respondent did not discharge this burden of proof nor did the courts require him to establish that any funds expended during the marriage *were not community funds. There is no pleadings or evidence whatsoever of any fraudulent or wrongful conduct on the part of Petitioner as regards the handling of funds which were in her possession during the marriage. There is no evidence that she performed any wrongful conduct as regards such funds and without Respondent's complaining of her conduct, either fraudulently or in some other unlawful manner, as to "invade" his property rights, the commingling doctrine is not applicable, and all expenditures should be considered as community expenditures for his benefit. Under this principle, any contributions he made, via the community, were expended during the marriage for his benefit and any property re-*

maining on hand belongs to the separate estate of Petitioner as fully disclosed by the comprehensive accounting established by Petitioner. The courts below, in not following these principles, completely ignored the rights of Petitioner as vested in her separate estate by the Constitution of the State of Texas and her rights to retain her separate estate as guaranted by the Constitution of Texas and her rights guaranteed to own and hold her property without being deprived thereof without due process of law. The courts below have in several instances as herein stated and as heretofore stated in the briefs and application of Petitioner deprived her of these constitutional guarantees and property rights without due proces of law on erroneous declarations of law WHICH REQUIRE AND DEMAND REVERSAL *of the courts below in adjudicating the property rights of Petitioner as they did.*

Considering further the serious errors committed by the courts in interpreting and enforcing the provisions of Article 4619, it is respectfully urged that the courts below committed errors which not only require but *demand* reversal by this court.

Article 1 of the Civil Statutes provides "The Common Law of England, *so far as it is not inconsistent with the Constitution and laws of this state, shall together with such Constitution and laws,* be the rule of decision, and shall continue in force until altered or repealed by the Legislature." The courts below have completely ignored this article and principle in determining the property rights of Petitioner and Respondent. *This is a fundamental error.* Article 3713 of the statutes further provides: "The Common Law of England as practiced and understood shall, in its application to evidence, be followed and practiced by the courts of this state, *so far as they may not be inconsistent with this title or any other law.*" The courts below have refused to follow the principle as announced in this article and such is a *fundamental error.*

Section 15 of Article 16 of the Constitution of Texas declares Petitioner's separate property and her rights therein to be as folows: "All property, both real and personal, of the wife, owned or claimed by her before mar-

riage, and that acquired, awarded by gift, devise or descent, *shall be the separate property;* * * * " This phase of our Constitution is *inconsistent* with the Common Law and abrogates the Common Law as regards a rule of decision or Common Law application in the determination of the property rights of Petitioner in and to the property owned or claimed by her before marriage. This the courts below did not recognize. Failure to recognize this is serious *fundamental error.* The courts below either ignored this provision of the Texas Constitution as regards Petitioner's property rights in her separate estate or considered such guaranteed rights of Petitioner in her separate estate as *repealed* or amended by Article 4619. This power to amend the Constitution is not vested in the Legislature nor would the Legislature attempt to repeal or rescind these constitutional provisions by Article 4619. The courts below in so holding that Article 4619 would, contrary to Section 15, Article 16 of the Constitution, by presumption of law divest Petitioner of property owned or claimed by her before marriage upon dissolution of the marriage, is contrary to the constitutional guarantees, principles heretofore declared by the courts and principles of property law as heretofore recognized by all courts as to Petitioner's interest in her separate estate. The courts below in ignoring and overriding all of this not only committed error but committed error of such a nature as to require reversal.

Further, in considering the seriousness of the errors committed by the courts below in their adjudication of the property rights of Petitioner in and to her separate estate owned previous to marriage, the trial court violated the very intent and declarations of Article 1 and Article 3713 because the courts below applied the Common Law as a "rule of decision" in adjudicating the separate property rights of Petitioner and, in so doing, applied principles of Common Law which are "inconsistent with" the Constitution of Texas and the statutory enactments pertaining to the rights of Petitioner in and to her separate property.

Further, the courts below in giving such great weight to the "presumption of law" under Article 4619, unlawfully and without authority or basis of justification, did that

which the Legislature could not do, to-wit: arbitrarily divest Petitioner of her undenied separate estate as created by the Constitution of the State of Texas. If the pronouncements as made by Judge Critz, which were adopted by this Supreme Court, in *Hawkins vs. Britton State Bank*, 52 SW (2) 243, and this Supreme Court in *Arnold vs. Leonard*, 273 SW 799, then that Section 15 of Article 16 of our Texas Constitution which says that all property owned or claimed by Petitioner before marriage shall be her separate property should be given the force and effect intended by the Constitution and if the Legislature cannot increase or diminish what shall constitute the separate property of Petitioner *then the courts below could not increase or diminish her separate property "by decision"*. The courts below in violating this very fundamental conception of our law committed grievous fundamental error which not only requires but *demands* reversal.

Petitioner here re-adopts her argument and briefs heretofore filed in this court with her application and in the courts below and respectfully asks this court to reconsider its action and take cognizance of the serious questions of a married woman's property rights as exist in this case.

The questions involved as regards Petitioner's property rights in this case *under this record presents questions so vital to the domestic laws of the state as to not only justify this court in granting the writ and according Petitioner a review of this record and the law involved by the court, as a whole, but should be acted upon by the court as a whole and the questions and record should be reviewed, as well as discussed, by the full court.* IT IS RESPECTFULLY URGED THAT THE DISSENTING OPINION OF THIS COURT OF CIVIL APPEALS SHOULD GIVE CREDENCE TO THE PETITIONER'S APPLICATION, THAT A WRIT SHOULD BE GRANTED AND THIS CASE GIVEN FULL REVIEW BY THE ENTIRE COURT. *Further, there is a conflict between the findings and holdings of the Court of Civil Appeals below and other Courts of Civil Appeals and Supreme Court decisions as regards very pertinent points material to the ultimate issues to be determined in this case and that such conflicts are as follows: One line of reasoning would result in an adjudi-*

cation of property rights of Petitioner and in following the other line of reasoning, the property rights of Petitioner would be adjudicated entirely differently. It is respectfully urged that this honorable court is confronted with conflict of decisions which are not only material to this case but are determinative of the ultimate isues and, in accordance with Rule of Civil Procedure No. 483, this Supreme Court SHOULD GRANT THE APPLICATION FOR WRIT OF ERROR UNLESS IT BE IN FULL AGREEMENT WITH BOTH THE DECISION OF THE COURT OF CIVIL APPEALS AND THE DECLARATIONS OF LAW UPON WHICH THE PROPERTY RIGHTS OF PETITIONER MUST NECESSARILY HAVE BEEN DETERMINED. This court in refusing the writ, no reversible error, has, in effect, stated that it is not in agreement with the decision of the Court of Civil Appeals because of its declarations of law. It is respectfully urged that the Court of Civil Appeals *did* incorrectly declare the law and likewise *did* incorrectly adjudicate the property rights of Petitioner. It is further respectfully urged that where there is a conflict between the decision of the court below and the decisions of the Supreme Court and other Courts of Civil Appeal, coupled with a dissenting opinion in the Court of Civil Appeals, that this honorable court should accept the responsibility of advising the world what laws may be followed to preserve and protect the separate estate of a married woman — for should this court do otherwise, then the property rights of Petitioner and all other married women in the State of Texas will dangle on the rope of uncertainty and provide no means whereby the bar or bench can ascertain the rights of married women upon any basis of assurance.

It is respectfully urged that the courts below committed the errors heretofore raised in the application and that such errors require reversal of the courts below and that the action of the court heretofore made in this case should be reconsidered in accordance herewith and the briefs and application heretofore filed and a writ granted and this Petitioner accorded a review by the full court.

THE TRIAL COURT RECOGNIZED AND FOUND ITSELF THAT THERE WERE NO EARNINGS LEFT AT THE DISSOLUTION OF MARRIAGE (STATEMENT OF FACTS, LINES 8 THROUGH 11,

PAGE 691). IF THIS BE TRUE, THEN RESPONDENT IS ENTITLED TO NOTHING AS ASSERTED BY PETITIONER.

It is respectfully urged that the trial court inadvertently depicted the true effect of the outcome of this case in the courts below when it addressed Petitioner's attorney and said, "If I give him (Respondent) less than half of this (property on hand) and it would be appealed, *you take a change of "losing" a great deal more money.*" According to Webster the word "lose" means: "to bring to destruction; to ruin; to destroy; or to damn". It is respectfully urged that the trial court was fully aware of its action when if referred to it as being such that Petitioner had already "lost" some of her property. Webster likewise states that the synonym for the word "lose" is "forfeit"; "mislay". It is respectfully urged that in this instance the court's holding was incorrect for it did in truth "forfeit" or "mislay" the separate property of Petitioner by judicial act.

WHEREFORE, Petitioner respectfully prays that this honorable court reconsider the Aplication for Writ of Error and the points presented therein, as well as the briefs heretofore filed, the argument and authorities in this motion and overall result of a final action in this case and that such application for Writ of Error be granted and the courts below reversed and judgment rendered for Petitioner or this cause be reversed and remanded allowing this Petitioner the relief to which she is entitled, both in law and in equity, and for such other relief to which Petitioner may show herself justly entitled, and in duty bound will she ever pray.

Respectfully submitted,
SIMPSON, CLAYTON & FULLINGIM
Box 1510, Amarillo, Texas

By
CLEO G. CLAYTON, JR.
Attorneys for Petitioner

Prior to the filing of the original of this Motion for Rehearing with this honorable court, a copy of the same was mailed to Honorable C. J. Humphrey, of the firm of Sanders, Scott, Saunders & Smith, 703 Amarilo Building, Amarillo, Texas,

counsel for Respondent, Theodore Hawkins Stanley, by forwarding the same in an envelope duly addressed, duly stamped and properly placed in the mails.

CLERK'S CERTIFICATE

I, Geo. H. Templin, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing Petitioner's Motion for Rehearing, is a true and correct copy of Petitioner's Motion for Rehearing as filed in this office in the case of Mary Hare Stanley vs Theodore Hawkins Stanley, No. A-6109, on the 14th day of February, 1957, such suit then pending in the Supreme Court of Texas, and I further certify that the foregoing is a copy of Petitioner's Motion for Rehearing which was denied by the Supreme Court of Texas with the notation "Overruled", on the 27th day of February, 1957, without written opinion of the court.

IN TESTIMONY WHEREOF, WITNESS MY HAND AND THE SEAL of the Supreme Court of Texas in the City of Austin, this 28th day of March, 1957.

/s/ GEO. H. TEMPLIN

(SEAL)

Geo. H. Templin, Clerk
Supreme Court of Texas

APPENDIX G

ARTICLE 4619, VERNON'S TEXAS ANNOTATED CIVIL STATUTES, VOLUME 13, PAGE 775

Sec. 1. All property acquired by either the husband or wife during marriage, *except that which is the separate property of either*, shall be deemed the common property of the husband and wife; *and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved.* During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

* * * *

(Italics added).

APPENDIX H

SECTION 15, ARTICLE 16 TO THE CONSTITUTION OF TEXAS, VERNON'S TEXAS CONSTITUTION, VOLUME 3, PAGE 101

Sec. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severality or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed. As amended Nov. 2, 1948. (Italics added).

APPENDIX I

ARTICLE 4614, VERNON'S TEXAS ANNOTATED CIVIL STATUTES, VOLUME 13, PAGE 719

All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have the sole management, control, and disposition of her separate property both real and personal; provided however, the joinder of the husband in the manner now prvided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law. Const. art. 16, Sec. 15; Acts 1848, p. 77; G.L. vol. 3, p. 77; Acts 1913, p. 61; Acts 1917, p. 436; Acts 1921, p. 251; Acts 1929, 41st Leg., p. 66, ch. 32, Sec. 1.
(Italics added).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 991

MARY HARE STANLEY,
Petitioner,

vs.

THEODORE HAWKINS STANLEY,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 991

MARY HARE STANLEY,
Petitioner,

vs.

THEODORE HAWKINS STANLEY,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Court:

Respondent prays that this Court refuse to grant Petitioner's Motion to file her Petition for Writ of Certiorari or, in the alternative, if leave be granted to file same, that such petition be denied for the following reasons:

JURISDICTION.

A. A Federal Question Cannot Be Raised for the First Time in a Petition for Rehearing After Judgment in the Highest Court of a State, So As to Bring the Case Within the Appellate Jurisdiction of the United States Supreme Court.

(*Waters-Pierce Oil Company* v. *State of Texas*, 29 S. Ct. 227, 212 U. S. 112; *Weber* v. *Rogan*, 23 S. Ct. 263, 188 U. S. 10; 22 Fed. Digest, Courts, Key 396 (6).)

The first time any Federal question was raised or attempted to be raised was in Petitioner's Motion for Rehearing filed in the Supreme Court of Texas. Respondent attaches hereto as Appendix A, p. A1, the points of error raised in the Court of Civil Appeals; as Appendix B, p. A5, the points of error raised in Motion for Rehearing in the Court of Civil Appeals; and, as Appendix C, p. A12, the points of error raised in Application for Writ of Error in the Supreme Court of Texas.

Petitioner had ample opportunity to raise the alleged Federal question on any one of these three occasions and failed to do so. In fact, after filing the original application for Writ of Error in the Supreme Court of Texas, petitioner filed a Supplemental Brief on December 5, 1956, and failed to mention or raise any Federal question.

This Court has further held, and it is well settled, THAT AN ASSERTION IN A STATE COURT IN A PETITION FOR REHEARING, THAT A FEDERAL RIGHT EXISTS, IS NO GROUND FOR INVOKING APPELLATE JURISDICTION OF THE FEDERAL SUPREME COURT, UNLESS THE STATE COURT PASSES ON THE FEDERAL GROUND RELIED UPON (*Live Oak Water Users Assn.* v. *Railroad Commission of State of California*, 46 S. Ct. 149, 269 U. S. 354; *Brown* v. *State of Colorado*, 1 S. Ct. 175, 106 U. S. 95; *Santa Cruz County* v. *Santa Cruz R. Co.*, 4 S. Ct. 474, 111 U. S. 361; *Miller* v. *Texas*, 14 S. Ct. 874, 153 U. S. 535).

B. No Federal Question Exists.

The petitioner seeks to present to this Court for review a *FACT QUESTION* bearing upon the SUFFICIENCY OF THE EVIDENCE IN THE TRIAL COURT. A fact question which was determined against petitioner in the

trial court, approved by the Court of Civil Appeals and the Supreme Court of Texas.

Article 4619, Vernon's Revised Civil Statutes of Texas, is simply a rule of evidence which requires the spouse who is claiming property acquired during marriage as "separate" property to "satisfactorily" prove that it is.

No court in Texas has ever held the above statute to be a "conclusive" presumption. The word "conclusive" is applied solely by petitioner and is used as an excuse for failing to meet the Burden of Proof to establish the separate character of the property involved. To illustrate the truth of this statement, respondent attaches as Appendix D, p. A21, hereof, his First and Second Counter Points in the Supreme Court of Texas which clearly and forcefully show that Article 4619 was not applied in this case as a "*conclusive*" presumption.

C. Federal Courts Have Followed Approved and Applied Article 4619, R. C. S. Texas, the Very Statute Attacked by Petitioner.

In the case of *Phillips* v. *Vitemb*, 235 F. 2d 11, the United States Fifth Circuit Court cites and follows the Supreme Court of Texas in *Hedge* v. *Ellis*, 154 Tex. 341, 277 S. W. 2d 900; *Rippy* v. *Rippy*, 49 S. W. 2d 494, together with other cases which have been approved and followed in Texas for countless years.

STATEMENT OF THE CASE.

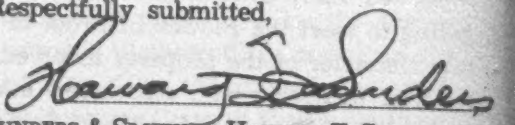
Respondent respectfully excepts to petitioner's argumentative and colored STATEMENT on Pages 4-8 in her petition. Respondent here adopts and submits the STATEMENT as set forth by the majority opinion of the Honor-

able Court of Civil Appeals, Seventh Supreme Judicial District of Texas. (See Appendix A. App. 22-25, Petitioner's Writ or 294 S. W. 2d 132).

CONCLUSION.

For the reasons set forth above, the Petition for Writ of Certiorari should in all things be refused and denied.

Respectfully submitted,



SANDERS, SCOTT, SAUNDERS & SMITH,
C. J. HUMPHREY, Member of Firm,
Amarillo, Texas,

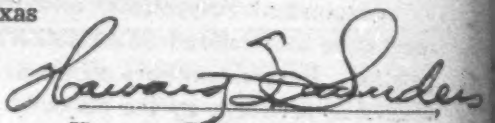
HOWARD F. SAUNDERS,
730 Amarillo Bldg.,
Amarillo, Texas,

Attorneys for Theodore Hawkins Stanley.

PROOF OF SERVICE.

I, Howard F. Saunders, one of the attorneys for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of May, 1957, I served copies of the foregoing Reply to Petitioner's Writ of Certiorari on petitioner by mailing copies thereof in duly addressed envelope, with adequate prepaid postage, to her attorneys of record as follows:

Cleo G. Clayton, Jr.
Simpson, Clayton & Fullingim
210 First National Bank Bldg.
Amarillo, Texas



HOWARD F. SAUNDERS.

APPENDIX A.

Petitioner's Points of Error upon Which Appeal to Court of Civil Appeals Was Predicated.

POINT NUMBER ONE.

The trial court erred in finding that Appellant had forfeited her separate estate in exercising her lawful control over her separate estate by successfully risking her sizable separate estate in order to create a community estate without any assistance from the husband or his separate estate, although he had the lawful obligation to provide a community estate for support purposes, because the declaration of forfeiture of Appellant's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER TWO.

The trial court erred in forfeiting the separate estate of Appellant on the basis that she exercised her lawful right to the sole management, control and disposition of her separate property and estate during the marriage of Appellant and Appellee and in considering her exercise of and control over her separate property and estate as such a "wrongful" conduct as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER THREE.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the community estate, if any, mixed with the separate estate of Appellant was property of like character, kind and value, and the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were each identifiable, one from the other.

POINT NUMBER FIVE.

The trial court erred in finding that the separate estate of Appellant had been so commingled with the community estate of Appellant and Appellee as to have lost its identity because the record reflects that the separate estate of Appellant had consistently, during the marriage of Appellant and Appellee, earned profits and that withdrawals from the community estate and the separate estate of Appellant exceeded the community estate and that, therefore, only the separate estate of Appellant remained.

POINT NUMBER SIX.

The trial court erred in holding that the burden of proof rested upon Appellant to establish that the separate estate of Appellant was entitled to reimbursement of the value of capital taken from such separate estate for the

use and benefit of the community estate because, upon dissolution of the marriage, where Appellant has contributed, as in this case, capital for the benefit of the community estate, Appellant is entitled to withdraw the value of the capital contributed by her separate estate, and the Appellee in wishing to take the position that the separate estate of Appellant is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of Appellant's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Appellee.

POINT NUMBER SEVEN.

The trial court erred in holding that all the property remaining at the time of the separation of Appellant and Appellee was community property because the evidence adduced on the trial hereof discloses that all the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Appellant was likewise expended toward community debts and usages, and therefore, there remained nothing in property other than the separate estate of the Appellant at such time.

POINT NUMBER EIGHT.

The trial court erred because it abused its discretion in adjudicating the respective rights of Appellant and Appellee herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Appellant and Appellee before applying community charges and expenses against the separate estate of Appellant in the determination of the property rights of the respective parties.

POINT NUMBER NINE.

The trial court erred in finding, contrary to the evidence, that Appellee did not, by his acts, consent, acquiescence and conduct give to Appellant as her separate estate all the income, rents, revenues, increases and earnings of Appellant realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The trial court erred in finding, contrary to the evidence, that the community estate of Appellant and Appellee was not indebted to the separate estate of Appellant because the evidence adduced at the trial hereof shows that the separate estate of Appellant was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The trial court erred in failing to find that Appellee is indebted to the separate estate of Appellant because of loans made from the separate estate of Appellant to Appellee because the evidence shows that monies or properties of the separate estate of Appellant were advanced to Appellee on the basis that such separate estate would be repaid by Appellee.

POINT NUMBER TWELVE.

The trial court erred, under the evidence in this case, in finding that the expenditure of the fruits and revenues from the wife's separate property became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of the wife's property

were expended for the upkeep and management of her separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of the wife.

APPENDIX B.

Petitioner's Points of Error in Motion for Rehearing Before Court of Civil Appeals.

POINT NUMBER ONE.

The trial court erred in finding that Appellant had forfeited her separate estate in exercising her lawful control over her separate estate by successfully risking her sizable separate estate in order to create a community estate without any assistance from the husband or his separate estate, although he had the lawful obligation to provide a community estate for support purposes, because the declaration of forfeiture of Appellant's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER TWO.

The trial court erred in forfeiting the separate estate of Appellant on the basis that she exercised her lawful right to the sole management, control and disposition of her separate property and estate during the marriage of Appellant and Appellee and in considering her exercise of and control over her separate property and estate as such a "wrongful" conduct as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER THREE.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the community estate, if any, mixed with the separate estate of Appellant was property of like character, kind and value, and the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were each identifiable, one from the other.

POINT NUMBER FIVE.

The trial court erred in finding that the separate estate of Appellant had been so commingled with the community estate of Appellant and Appellee as to have lost its identity because the record reflects that the separate estate of Appellant had consistently, during the marriage of Appellant and Appellee, earned profits and that withdrawals from the community estate and the separate estate of Appellant exceeded the community estate and that, therefore, only the separate estate of Appellant remained.

POINT NUMBER SIX.

The trial court erred in holding that the burden of proof rested upon Appellant to establish that the separate estate of Appellant was entitled to reimbursement of the

value of capital taken from such separate estate for the use and benefit of the community estate because, upon dissolution of the marriage, where Appellant has contributed, as in this case, capital for the benefit of the community estate, Appellant is entitled to withdraw the value of the capital contributed by her separate estate, and the Appellee in wishing to take the position that the separate estate of Appellant is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of Appellant's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Appellee.

POINT NUMBER SEVEN.

The trial court erred in holding that all the property remaining at the time of the separation of Appellant and Appellee was community property because the evidence adduced on the trial hereof discloses that all the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Appellant was likewise expended toward community debts and usages, and therefore, there remained nothing in property other than the separate estate of the Appellant at such time.

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The trial court erred because it abused its discretion in adjudicating the respective rights of Appellant and Appellee herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Appellant and Appellee before applying community charges and expenses against the separate estate of Appellant in the determination of the property rights of the respective parties.

POINT NUMBER NINE.

The trial court erred in finding, contrary to the evidence, that Appellee did not, by his acts, consent, acquiescence and conduct give to Appellant as her separate estate all the income, rents, revenues, increases and earnings of Appellant realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The trial court erred in finding, contrary to the evidence, that the community estate of Appellant and Appellee was not indebted to the separate estate of Appellant because the evidence adduced at the trial hereof shows that the separate estate of Appellant was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The trial court erred in failing to find that Appellee is indebted to the separate estate of Appellant because of loans made from the separate estate of Appellant to Appellee because the evidence shows that monies or properties of the separate estate of Appellant were advanced to Appellee on the basis that such separate estate would be repaid by Appellee.

POINT NUMBER TWELVE.

The trial court erred, under the evidence in this case, in finding that the expenditure of the fruits and revenues from the wife's separate property became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of the wife's property were expended for the upkeep and management of her

separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of the wife.

In view of the action of this Honorable Court in arriving at the conclusions of law and findings of fact as stated in its opinion rendered, Appellant urges the following assignment of error in addition to those heretofore set forth in Appellant's Brief for the reasons stated in such assignment, to-wit:

POINT NUMBER THIRTEEN.

This Honorable Court of Civil Appeals erred in the method in which it considered the assignments of error presented in Appellant's Brief filed herein designated therein as points raised herein pertaining to the "sufficiency of the evidence" for the reason that this Court in rendering its majority opinion has in effect ruled that "evidence of any probative values" in support of the findings of the trial court determines that the findings and judgment of the trial court is not "contrary to the evidence or the overwhelming weight of all the evidence as to be clearly wrong and unjust."

POINT NUMBER FOURTEEN.

This Honorable Court erred in so basing its majority opinion upon isolated bits of evidence and testimony rather than resorting to the testimony and evidence as a whole to obtain a construction which would be placed thereon as a matter of law.

Appellant here respectfully says to the Court that it has not complied with Texas Rule of Civil Procedure 451 in that it has not decided on all issues presented by proper assignments of error raised herein by Appellant and in announcing in writing this Court's conclusions thereto, and Appellant hereby makes such failure of the Court and the complaint thereof as her assignment of error No. 15, to-wit:

POINT NUMBER FIFTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because this Honorable Court did not decide on issues presented to it by proper assignments of error herein by Appellant and announce in writing this Court's conclusions thereto.

APPENDIX C.

Petitioner's Points of Error in Application for Writ of Error in Supreme Court of Texas.

POINT NUMBER ONE.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding that Petitioner had forfeited her separate estate in exercising her lawful control over her separate estate in order to create a community estate because the declaration of forfeiture of Petitioner's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Petitioner and Respondent.

POINT NUMBER TWO.

The Court of Civil Appeals erred in sustaining the trial court's forfeiting the separate estate of Petitioner on the basis that she exercised her lawful right to the sole management, control and disposition of her separate estate during the marriage and in considering her exercise of and control over her separate estate as such a "wrongful conduct" as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Petitioner and Respondent.

POINT NUMBER THREE.

The Court of Civil Appeals erred in sustaining the action of the trial court in applying the "commingling doctrine" to this case in adjudicating the property rights of Petitioner and Respondent because the respective inter-

ests of the community estate of Petitioner and Respondent and the separate estate of Petitioner were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The Court of Civil Appeals erred in sustaining the action of the trial court in applying the "commingling doctrine" to this case in adjudicating the property rights of Petitioner and Respondent because the community estate, if any, mixed with the separate estate of Petitioner was property of like character, kind and value, and the respective interests of the community estate of Petitioner and Respondent and the separate estate of Petitioner were each identifiable, one from the other.

POINT NUMBER FIVE.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding that the separate estate of Petitioner had been so commingled with the community estate of Petitioner and Respondent as to have lost its identity because the record reflects that the separate estate of Petitioner had consistently, during the marriage of Petitioner and Respondent, earned profits and that withdrawals from the community estate and the separate estate of Petitioner exceeded the community estate and that, therefore, only the separate estate of Petitioner remained.

POINT NUMBER SIX.

The Court of Civil Appeals erred in sustaining the action of the trial court in holding that the burden of proof rested upon Petitioner to establish that the separate estate of Petitioner was entitled to reimbursement of the value of capital taken from such separate estate for the use and benefit of the community estate because, upon dissolution

of the marriage, where Petitioner has contributed, as in this case, capital for the benefit of the community estate, Petitioner is entitled to withdraw the value of the capital contributed by her separate estate, and Respondent in wishing to take the position that the separate estate of Petitioner is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of the Petitioner's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Respondent.

POINT NUMBER SEVEN.

The Court of Civil Appeals erred in sustaining the action of the trial court finding that all property remaining at the time of the separation of Petitioner and Respondent was community property because the evidence adduced on the trial hereof discloses that all of the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Petitioner was likewise expended toward community debts and usages and, therefore, there remained nothing in property other than the separate estate of the Petitioner at such time.

POINT NUMBER EIGHT.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court abused its discretion in adjudicating the respective rights of Petitioner and Respondent herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Petitioner and Respondent before applying community charges and expenses against the separate estate of Petitioner in determination of the property rights of the respective parties.

POINT NUMBER NINE.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court erred in finding, contrary to the evidence, that Respondent did not by his acts, consent, acquiescence and conduct give to Petitioner as her separate estate all the income, rents, revenues, increases and earnings of Petitioner realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding, contrary to the evidence, that the community estate of Petitioner and Respondent was not indebted to the separate estate of Petitioner because the evidence adduced in the trial hereof shows that the separate estate of Petitioner was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court failed to find that Respondent is indebted to the separate estate of Petitioner because of loans made from the separate estate of Petitioner to Respondent because the evidence shows that monies or properties of the separate estate of Petitioner were advanced to Respondent on the basis that such separate estate would be repaid by Respondent.

POINT NUMBER TWELVE.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court erred, un-

der the evidence in this case, in finding that the expenditure of the fruits and revenues from Petitioner's separate estate became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of Petitioner's property were expended for the upkeep and management of her separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of Petitioner.

POINT NUMBER THIRTEEN.

The Court of Civil Appeals erred in the method in which it considered the Points of Error presented in Appellant's Brief filed herein as points raised pertaining to the "sufficiency of the evidence" for the reason that this court in rendering its majority opinion has in effect ruled that "evidence of any probative value" in support of the findings of the trial court determines that the findings and judgment of the trial court is not "contrary to the evidence or the overwhelming weight of all the evidence, as to be clearly wrong and unjust."

POINT NUMBER FOURTEEN.

The Court of Civil Appeals erred in basing its majority opinion upon isolated bits of evidence and testimony rather than resorting to the testimony and evidence as a whole to obtain a construction thereof which would be placed thereon as a matter of law.

POINT NUMBER FIFTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because this

Honorable Court did not decide on points presented to it by proper assignments of error herein by Petitioner and announce in writing its conclusions thereto.

POINT NUMBER SIXTEEN.

The Court of Civil Appeals erred in its majority opinion in failing to adopt the dissenting opinion filed herein which sustained Points Numbers One, Three, Four, Five, Seven, Eight and Ten as raised in Appellant's Brief.

POINT NUMBER SEVENTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number One of Appellant's Brief.

POINT NUMBER EIGHTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Two of Appellant's Brief.

POINT NUMBER NINETEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Three of Appellant's Brief.

POINT NUMBER TWENTY.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did

not decide the issues presented to it by proper assignment of error raised in Point Number Four of Appellant's Brief.

POINT NUMBER TWENTY-ONE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Five of Appellant's Brief.

POINT NUMBER TWENTY-TWO.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Six of Appellant's Brief.

POINT NUMBER TWENTY-THREE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Seven of Appellant's Brief.

POINT NUMBER TWENTY-FOUR.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Eight of Appellant's Brief.

POINT NUMBER TWENTY-FIVE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Nine of Appellant's Brief.

POINT NUMBER TWENTY-SIX.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Ten of Appellant's Brief.

POINT NUMBER TWENTY-SEVEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Eleven of Appellant's Brief.

POINT NUMBER TWENTY-EIGHT.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Twelve of Appellant's Brief.

POINT NUMBER TWENTY-NINE.

The Court of Civil Appeals, in sustaining the action of the trial court, committed fundamental error because the trial court and the Court of Civil Appeals considered the presumption that "all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved" as a presumption "of fact" rather than a presumption "of law" in determining the material issues affecting the property rights of Petitioner and Respondent.

POINT NUMBER THIRTY

The Court of Civil Appeals, in sustaining the action of the trial court, committed fundamental error because the trial court and Court of Civil Appeals considered that "mixing of dollars with dollars," in spite of a comprehensive accounting establishing at all times the monetary interests of the respective parties, was such a "commingling" as to justify the application of the common law "doctrine of commingling" and thereby forfeit the original separate funds of Petitioner and convert the same to a community property status of Petitioner and Respondent.

APPENDIX D.

First and Second Counter Points of Respondent's Reply Filed in Supreme Court of Texas.

FIRST COUNTER POINT.

The Court of Civil Appeals and the trial court correctly held that all property which is possessed by the husband and wife at the dissolution of the marriage is presumed to be community property unless the contrary is satisfactorily proved.

SECOND COUNTER POINT.

The trial court and the Court of Civil Appeals correctly held that no single item of property or money could be traced, (either in the original or converted form) to support the contention that same was petitioner's separate property, or separate money or purchased with her separate property. (Germane to petitioner's points 1 through 8, 12, 16, 29 and 30).

STATEMENT.

Respondent challenges the unsupported statement that $84,044.63 (earnings) and $41,911.13 from petitioner's separate estate was expended. This is not only false * * * it is impossible.

Respondent challenges the unsupported statement that the audit "reflects the separate estate had by this petitioner during each year of the marriage." The auditor testified to the contrary (S. F. p. 436, lines 4-8).

Nowhere does Petitioner attempt to describe the *property* on hand at the time of the divorce and point out

the testimony and evidence concerning it. With the court's permission, we will do so, and demonstrate to the Court that petitioner was unable to trace or identify, as her separate property, any specific piece of property which was on hand at the time of the divorce hearing.

1. *Cowboy Cafe*: The Contract of Sale (Defendant's Exhibit No. 3) and the Bill of Sale (Defendant's Exhibit No. 4), both reflect that the sale was made to Ted and Mary Stanley. The Auditor testified that it was not possible to determine whether its purchase price was paid out of money which Mrs. Stanley had prior to her marriage to Respondent or whether same was paid for out of earnings of the parties after the marriage (S. F. Page 364, lines 5 through 11). Mrs. Stanley testified, "You can pay me $4,000.00 and I will give you my part." (S. F. Page 99, lines 1 and 2).

2. *1955 Chevrolet Station Wagon, subject to indebtedness*: The respondent makes no contention that the equity in the automobile is not a portion of the community property estate, and no claim is made by petitioner that it is her separate property.

3. *Southern Finance Company assets in the amount of $10,198.20*: Mr. Likes testified in response to the following question as follows:

> Question—"There is no way that you right now can tell this Court what part of this $10,198.20 of capital that was left from all of these companies represents earnings during the period and represents capital that was on hand before the marriage?" (S. F. Page 352, lines 16-20).
>
> Answer—"That's right." (S. F. Page 354, line 14).

4. *The checking account in the amount of $807.91*: Mr. Likes gives the same answer as in the number immediately preceding (S. F. page 354).

5. *The Cashier's Check in the amount of $5,114.09*: Again Mr. Likes is unable to determine whether it was purchased from moneys on hand prior to the marriage or moneys which came from earnings during the marriage (S. F. Pages 354-355).

6. *Cash in Mrs. Stanley's possession—$1,000.00*: The Accountant apparently had no record of this cash on hand, and no attempt was ever made by the petitioner to establish that this sum of money was her separate property and estate.

7. *The home at 1511 Austin, with an agreed value of $26,300.00*: The evidence reflects that the property was conveyed to *respondent, T. H. Stanley*, reciting a consideration of $26,300.00, of which $18,392.09 is cash paid, and the assumption by *grantee* (*respondent*) of the unpaid balance due on a purchase money note, said balance at the time of purchase being $7,907.91 (Defendant's Exhibit No. 1). The petitioner admits that the property was conveyed to her sister Lula O. Fisher for the purpose of protecting the property from possible liabilities and indebtedness incurred as a result of the operation of The Nat Ball Room, and that such conveyance was without any consideration, and that the deed was back-dated (S. F. Pages 613-614). The petitioner further testified that she had obtained an unrecorded deed from her sister, Lula O. Fisher Vaughn and husband, and that no consideration of any kind was paid therefor. In this deed the grantee was Mary H. Stanley and it in no place recited that it was conveyed to her as her separate property and estate (Defendant's Exhibit No. 6, S. F., Pages 614-616).

The down payment on the home was paid for by an escrow check of $2,600.00, and an additional check in the amount of $15,789.93, (Plaintiff's Exhibits 22 and 22A). The Certified Public Accountant was unable to testify as to what portion of this money came from money on hand prior to marriage and money that was earned during the marriage (S. F. Page 365, Lines 17-23). The monthly payments on the house plus the house improvements and the final liquidation of indebtedness due Security Federal on the house likewise could not be determined to be paid from petitioner's separate property (S. F. Pages 366-367).

8. *Cash in Deposit Box at First National Bank—$37,500.00*: Mr. Likes testified that he was not able to tell the Court how much of this money was on hand prior to the marriage and how much was made during the marriage (S. F. Pages 355, 357, 437). Mr. Likes repeatedly testified that he had never made an audit of the moneys that were in the safety deposit box from time to time (S. F. Page 433); in fact, this Auditor testified in response to a question by the Court that the safety deposit box was used as "A kind of a grab-all—if you couldn't place it any place else you put it in the safety deposit box—in your accounting." (S. F. Page 340, lines 18-24). He further testified that there might be entries in the audit showing money put into the safety deposit box that was never put in and money taken out that was never taken out (S. F. Page 341).

Plaintiff's Exhibits 1 and 2 were envelopes which showed all of the deposits and withdrawals from the safety deposit box in question from December 19, 1944 to June 7, 1951. The petitioner testified that *she just stopped keeping records after this date.* She had no records of any kind in connection with the moneys that she deposited and removed from this safety deposit box (S. F. Pages

120-121); in fact, the petitioner testified both on deposition and at the trial that the property on hand at the time of the divorce hearing was hers because she made every dime of it herself and that it had been made since the marriage but that she is the one who made it (S. F. pages 543-544).

9. *1952 Cadillac Automobile*: Mr. Likes testified that he could not tell whether this car was paid for out of funds the petitioner had prior to her marriage or from earnings made during the marriage (S. F. Page 359, lines 16-20).

10. *Travel Checks and Cash in the Amount of $400.00, and the Cash in the Amount of $3,600.00*: This was money that apparently even the Auditor did not know petitioner had in her possession. He did not include it in his tabulation sheet which is Plaintiff's Exhibit No. 4, and these funds first came to light toward the close of the trial (S. F. Page 595). No effort was made to show that these cash amounts were moneys which the petitioner had on hand prior to the date of her marriage to the respondent.

At least twice the Certified Public Accountant who had looked after the petitioner's books since 1947 was asked to trace the money on hand or which purchased the items of personalty and realty listed above, and he was unable to testify that a single item came from moneys that were on hand prior to the marriage (S. F. Page 399, lines 12-19; S. F. 408-411; S. F. 445).

The Auditor could not testify whether or not the community expenses were paid out of earnings made during the marriage (S. F. Page 437, line 21); whether the income taxes were paid out of earnings (S. F. Page 438 lines 3-9); he could not tell how much capital in the four loan companies or the checking account at the end of any

year was money which Mrs. Stanley had on hand prior to the marriage or was money that had been earned during the marriage (S. F. Page 436, lines 4-8). The same was true as to the checking account column shown on Plaintiff's Exhibit No. 4 (S. F. Page 436, lines 10 through 14).

In connection with all of the foregoing, the Court must keep in mind that this was a small loan business consisting of personal loans from $50.00 to $100.00, and that it was impossible to trace the loans which were made, and to come to any conclusion as to whether the loans were made with money which was on hand prior to the marriage or whether the loans were made with money which was earned during the marriage. Mr. Likes testified that it just couldn't be done (S. F. Page 194).

AUTHORITIES.

Bantuelle v. *Bantuelle*, 195 S. W. 2d 686.
Carle v. *Carle*, 234 S. W. 2d 907, cert. questions ans., 234 S. W. 2d 1002 and 235 S. W. 2d 925.
Earnest v. *Earnest*, 223 S. W. 2d 681.
Gibson v. *Gibson*, 202 S. W. 2d 288.
Gillespie v. *Gillespie*, 110 S. W. 2d 89.
Hardee, Sheriff, v. *Vincent*, 147 S. W. 2d 1072.
Harkness v. *McQueen*, 232 S. W. 2d 629.
Hendrick v. *Hendrick*, 222 S. W. 2d 281.
Kuehn v. *Kuehn*, 259 S. W. 290.
Rippy v. *Rippy*, 49 S. W. 2d 494 (writ ref.).
Schwethelm v. *Schwethelm*, 1 S. W. 2d 911.
Skinner v. *Skinner*, 202 S. W. 2d 318.
Schmeltz v. *Garey*, 49 Texas 49 (S. C.).
Walker-Smith Co. v. *Coker*, 176 S. W. 2d 1002 (Error ref.).

STATUTES.

Article 4619, V. R. C. S., 1925.

ARGUMENT.

This record conclusively shows that all ten of the items of property listed in the foregoing statement were acquired during the marriage of the parties hereto. Article 4619, V. R. C. S., 1925, provides that, except as therein stipulated, all property acquired by either the husband or wife during marriage is presumed to be community property. The statutory presumption further contains that "All of the property which the husband and wife possess at the time the marriage may be dissolved may be regarded as common effects or gains unless the contrary is satisfactorily proved."

These presumptions obtain as to real estate, *Rippy* v. *Rippy*, 49 S. W. 2d 494 (writ ref.). These presumptions obtain as to personal property. In *Walker-Smith Co.* v. *Coker*, 176 S. W. 2d 1002 (error ref.), it was held that merchandise acquired during marriage, although purchased with the wife's separate funds, was presumed to be community property and the husband and wife had the burden of proving its separate ownership as against the execution creditor of the husband.

This presumption as to community property is one of the best established rules in our jurisprudence, whether the claim of separate property is advanced by either the husband or the wife. *Kuehn* v. *Kuehn*, 259 S. W. 290; *Schwethelm* v. *Schwethelm*, 1 S. W. 2d 911; *Gillespie* v. *Gillespie*, 110 S. W. 2d 89; *Bantuelle* v. *Bantuelle*, 195 S. W. 2d 686; *Gibson* v. *Gibson*, 202 S. W. 2d 288; *Hendrick* v. *Hendrick*, 222 S. W. 2d 281; *Earnest* v. *Earnest*, 223 S. W. 2d 681; *Carle* v. *Carle*, 234 S. W. 2d 907, certified questions answered 234 S. W. 2d 1002 and 235 S. W. 2d 924.

In fact, while the earlier cases refer to the language of the statute and require that the showing of separate

property be *satisfactorily* proved, the later cases in Texas hold that the presumption of community character of property acquired by either spouse during the marriage is very strong and can be overcome only by *clear and convincing proof* that it belongs to one or the other of them, and the burden of proving its separate character is always upon him who asserts it. *Skinner* v. *Skinner*, 202 S. W. 2d 318; *Harkness* v. *McQueen*, 232 S. W. 2d 629.

The Honorable Trial Court properly concluded from the evidence and testimony that no single item of property or money could be traced either in the original or converted form in support of the contention of appellant that the same was her separate property, or separate money, or purchased with her separate property which she had on hand prior to her marriage to Respondent.

Petitioner attempted to "satisfactorily prove" that such property was her separate property, as follows:

"Before marriage I had cash or investments totaling $85,954.29, plus bonds and a Cadillac automobile. My husband (appellee) had nothing. After six and one-half years of marriage I have $41,911.93 less than when I was married, and the profits of $84,044.63 made from my business during marriage is also gone." (Summary of petitioner's statement under points 1 through 5).

We have shown the Court the falsity of this statement, but even if true, it is simply an attempt by petitioner to show the amount of property she had on hand prior to marriage followed by the amount of property she had at the dissolution of the marriage and is not sufficient nor satisfactory to discharge the burden of proof required by the above statute and cases. The Court in *Rippy* v. *Rippy, supra*, citing Speer on the Law of Marital Rights, page 434, speaks on this very point:

"The facts that at the marriage the husband had much money and the wife nothing, and that during the marriage relation the parties decreased in fortune, making nothing, will not rebut this presumption unless the purchase money or consideration is explicitly traced to the separate property of the husband." (The statement in quotations is found in 49 S. W. 2d, at page 496).

The same rule was applied in *Gibson* v. *Gibson*, 202 S. W. 2d 288, where the husband owned fixtures and stock-in-trade of a liquor store at the time of marriage, and after marriage continued to buy and sell merchandise but maintained only one bank account in which he mingled profits from sales with his capital investment. The wife upon being granted a divorce was denied any recovery of community property because the inventory, fixtures, stock-in-trade and cash in bank at the time of the divorce was less than at the time of marriage. The appellate Court reversed the decision of the Trial Court and held under Article 4619, V. R. C. S., that the burden was on the husband to show what portion of the community estate was in fact his separate property. The evidence showed that the husband had kept no records as to how much of the capital investment and how much of the profits were used in replenishing the stock, and only showed that at the end of the marirage there was a decrease in the inventory of some $744.21.

The Court in the *Gibson* case stated that the Commission of Appeals in *Hardee, Sheriff*, v. *Vincent*, 147 S. W. 2d 1072, was directly in point. In that case, the husband had given his grocery store to his wife as her separate property and thereafter they operated the business selling the stock-in-trade and replenishing it with new stock. The new stock was paid for out of an account which did not show how much of it was original capital and how much was profits from the business. Later a judgment

was rendered against Vincent, the husband, and a levy was made upon the stock-in-trade of the store. Mrs. Vincent claimed the same was her separate property. Judge Slaton, speaking for the Commission of Appeals said:

> "The proof shows that dry goods and fixtures were purchased on credit and paid for out of funds from the business; that groceries were bought and paid for with cash out of the business. Whether the cash paid for the merchandise and fixtures came out of the capital investment or profits of the business does not appear—Absent proof that the money so used came out of the capital investment, which is the state of the record, the presumption of the law that that property acquired by either husband or wife during marriage belongs to the community estate of the husband and wife, controls in the present case."

The above rule of law has been consistently followed in Texas since the early Supreme Court decision in *Schmeltz* v. *Garey*, 42 Texas 49, wherein the evidence disclosed the husband to have over $100,000.00 worth of assets at marriage, and much less than this at the time of the divorce. The Court held that this was not sufficient and the evidence was too indefinite to rebut the presumption established by the statute, that property acquired during marriage is community property. The Court further stated that this was not a case where specific property, proven to have been separate estate was exchanged; but a case in which it was necessary to trace the means through mutations and changes, and this should have been done "clearly and indisputably."

Respondent respectfully submits that petitioner failed to discharge the burden of satisfactorily proving that all, or any part of the community estate was her separate property in its original or converted form or was purchased with property she possessed before marriage. Wherefore, respondent prays that the judgment of the Trial Court be affirmed.